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**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED INC., et al.,
Petitioners,

v.

ROGER M. BALDWIN, District Engineer,
United States Corps of Engineers, et al.
Respondents

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**ROBERT RAYMOND ELLIOTT
ELLIOTT AND BELL, P.C.
1201 PENNSYLVANIA AVE., N.W.
SUITE 803
Washington, D.C. 20004
(202) 887-5858**

**ROBERT J. SUGARMAN
ROBIN T. LOCKE
Counsel for Petitioners**

**Of Counsel:
SUGARMAN & DENWORTH
121 S. Broad Street
Suite 510
Philadelphia, PA 19107
(215) 546-0162
October 31, 1983**

QUESTIONS PRESENTED

1. Are not challengers to an administrative agency decision based on an ex parte informal self-designated "record" entitled to introduce evidence in the District Court to prove their well-pleaded allegations that the agency has acted arbitrarily and capriciously in violation of the Administrative Procedure Act, and has failed to include all relevant material in the "record"?

2. Must not the Corps of Engineers, in authorizing a project intruding on a National Historic Landmark comply with a 1980 Congressional mandate to take maximum possible action to minimize harm to a National Historic Landmark, 16 U.S.C. §470h-2(f), rather than relying on the action of another agency which admittedly failed to perform that statutory function?

LIST OF PARTIES

DEL-AWARE UNLIMITED, INC.; VAL SIGSTEDT, COLLEEN WELLS; MARC SADOUX; MARION W. MASLAND; TOWNSHIP OF BRISTOL; NORMAN AND DIANE TORKELSON; THE PHILADELPHIA FEDERATION OF SPORTSMEN'S CLUBS; CHARLES GILMORE; MARY ELLEN NOBLE; THE PENNSYLVANIA STATE FEDERATION OF SPORTSMEN'S CLUBS; HONORABLE RITA C. BANNING; WATERSHED ASSOCIATION OF THE DEL-AWARE RIVER; HONORABLE JAMES C. GREENWOOD; HONORABLE CARL FONASH,

Appellants

v.

ROGER M. BALDWIN, individually, and as District Engineer, U.S. Army Corps of Engineers; ALEXANDER ALDRICH, individually, and as Chairman of the Advisory Council on Historic Preservation; WILLIAM GORDON, individually, and as Assistant Secretary, U.S. Department of Commerce; GERALD HANSLER, individually, and as Executive Director, the Delaware River Basin Commission; HAROLD DENTON, individually, and as Director, Division of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission; THE NUCLEAR REGULATORY COMMISSION; THE HONORABLE PETER DUNCAN, as Secretary Of The Department of Environmental Resources of the Commonwealth of Pennsylvania; NESHAMINY WATER RESOURCES AUTHORITY; and PHILADELPHIA ELECTRIC COMPANY,

Appellees

TABLE OF CONTENTS

Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Statement of Jurisdiction	1
Statement of Facts	1
Argument	16
Conclusion	56
Appendix	58

TABLE OF AUTHORITIES

CASES:

<u>Asarco v. U.S. Environmental Protection Agency</u> , 616 F.2d 1153, (9th Cir. 1980)	23,33
<u>Baltimore Gas and Electric Co. v. NRDC</u> , U.S. , 103 S.Ct. 2246, 51 L.W. 4683 (1983).....	17,25,30, 34,36,37,
<u>Batterton v. Francis</u> , 432 U.S. 416 (1976)	38 35
<u>Camp v. Pitts</u> , 411 U.S. 135 (1973) ..	16,29,31, 32,34
<u>Citizens to Preserve Overton Park v. Volpe</u> , 401 U.S. 402 (1971)....	16,17,18, 19,20,25,
<u>Citizens to Preserve Overton Park v. Volpe</u> , 335 F.Supp. 873 (W.D. Tenn. 1972) (on remand)	30,37,39, 40,43,47,53 19
<u>Como-Falcon Coalition, Inc. v. U.S. Department of Labor</u> , 465 F.Supp. 850 (D. Min. 1978) <u>mod ofh gr</u> 609 F.2d 342 (8th Cir. 1979) <u>cert den</u> 446 U.S. 936.....	27
<u>County of Suffolk v. Secretary of Interior</u> , 562 F.2d 1368 (2d Cir. 1977)	23,27
<u>Delaware Water Emergency Group v. Hansler</u> , 536 F.Supp. 26 (E.D. Pa. 1981) <u>aff'd</u> , 681 F.2d 805 (3d Cir. 1982)	7,8,21
<u>D.C. Federation of Civic Associations v. Volpe</u> , 459 F.2d 1231, 1239 (D.C. Cir. 1972)	48

<u>Environmental Coalition of Nuclear Power v. Nuclear Regulatory Commission, No. 75-1421 (3d Cir., Nov. 12, 1975 (Judgment Order)...</u>	7
<u>Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1028 (4th Cir. 1975) <u>cert den</u>, 423 U.S. 912 (1975).....</u>	23
<u>Grazing Field Farms v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980).....</u>	23
<u>Greene v. McElroy, 360 U.S. 474 (1959).....</u>	22
<u>Harrisburg Coalition Against Runing The Environment v. Volpe, 330 F.Supp. 918 (M.D. Pa. 1971).....</u>	53
<u>Image of Greater San Antonio, Texas v. Brown, 570 F.2d 517 (5th Cir. 1978).....</u>	23
<u>Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981), <u>cert den.</u>, 454 U.S. 1092 (1982).....</u>	23
<u>Kleppe v. Sierra Club, 427 U.S. 390 (1976).....</u>	24, 25
<u>Louisiana Environmental Society, Inc. v. Coleman, 537 F.2d 79, (5th Cir. 1976), <u>reh den</u>.....</u>	48
<u>Louisiana Environmental Society, Inc. v. Dole, 707 F.2d 116, (5th Cir. 1983).....</u>	29
<u>Ma natee County v. Gorsuch, 554 F.Supp. 778 (M.D. Fla. 1982).....</u>	29

<u>Motor Vehicle Manufacturers Ass'n</u> <u>v. State Farm Insurance Co.,</u> <u> U.S. , 103 S.Ct. 285</u> <u>(1983).....</u>	33, 35 36
<u>Pennsylvania Public Utility</u> <u>Commission v. Philadelphia</u> <u>Electric Co., 460 A.2d 734 (Pa.</u> <u>1983).....</u>	3
<u>Philadelphia Council of Neighborhood</u> <u>Organizations v. Coleman, 437 F.</u> <u>Supp. 1341 (E.D. Pa. 1977), aff'd</u> <u>Men, 578 F.2d 1375 (3d Cir. 1978)</u>	21, 30
<u>Roe v. Norton, 422 U.S. 391 (1974).</u>	52
<u>Save Our Ten Acres v. Kreger, 472</u> <u>F.2d 463 (5th Cir. 1973).....</u>	28
<u>Sierra Club v. U.S. Corps of</u> <u>Engineers, 702 F.2d 1011, 1031</u> <u>(2d Cir. 1983).....</u>	28
<u>Soric v. Immigration and</u> <u>Naturalization Service, 382 U.S.</u> <u>285 (1965)</u>	51
<u>Stop H-3 Association v. Coleman,</u> <u>533 F.2d 434 (9th Cir. 1976)</u> <u>reh den sub nom Wright v. Stop</u> <u>H-3 Association, 429 U.S.</u> <u>999.....</u>	52
<u>Stryker's Bay v. Karlen, 444 U.S.</u> <u>223 (1979).....</u>	24
<u>Texas v. New Mexico, U.S. ,</u> <u>103 S.Ct. 2558 (1983).....</u>	55
<u>Thorpe v. Housing Authority of</u> <u>Durham, 386 U.S. 670 (1966).....</u>	51

<u>Township of Lower Alloways Creek</u> <u>v. Public Service Electric and</u> <u>Gas, 687 F.2d 732 (3d Cir.</u> <u>1982).....</u>	21
<u>Township of Springfield v. Lewis,</u> <u>18 ERC 1873 (3d Cir. 1983).....</u>	21
<u>Vermont Yankee Nuclear Power</u> <u>Corp v. NRDC, 435 U.S. 519</u> <u>(1977).....</u>	24, 30 34, 36 37, 38

STATUTES

Administrative Procedures Act	1, 12
5 U.S.C. 551 <u>et seq.</u>	17
Clean Water Act	
33 U.S.C. 1251 <u>et seq.</u>	9
Department of Transportation Act	40, 44
Section 4(f), 49 U.S.C. §1653(f).	47, 48
	52, 53
Fish and Wildlife Coordination Act	
16 U.S.C. §661 <u>et seq.</u>	12
National Environmental Policy Act	1, 10
42 U.S.C. §433 <u>et seq.</u>	12, 24
National Historic Preservation Act	2, 10,
16 U.S.C. 461 <u>et seq.</u>	11, 12
Section 110(f), 16 U.S.C.	39, 40, 53
470h-2(f).....	41, 42, 54
	44, 45, 56
Rivers and Harbors Appropriate Act	49, 50
33 U.S.C. §401, <u>et seq.</u>	9

MISCELLANEOUS

Act of May 11, 1949, P.L. 1203 §1, 30 P.S. §431.....	5
---	---

Delaware River Basic Compact 87-328, 75 Stat. 688 (1961).....	54, 55
H.R. Rep. No. 96-1457, 96th Cong. 2nd Sess. 38 (1980).....	41
Frankfurter, "The Task of Administrative Law", 75 U.Pa.L. Rev. 614 (1927).....	51
Jaffe, <u>Judicial Control of</u> Administrative Action, 564-65 (1965).....	36

STATEMENT OF JURISDICTION

This is a petition for review of a Judgment Order entered July 5, 1983 by the Court of Appeals for the Third Circuit in Del-AWARE Unlimited, Inc., et al. v. Roger M. Baldwin et al., Civil No. 83-1010, affirming without opinion an Order entered December 17, 1982 in the District Court for the Eastern District of Pennsylvania in Del-AWARE Unlimited Inc., et al. v. Roger M. Baldwin et al., Civil No. 82-5115, denying plaintiffs' Motion for Preliminary Injunction. A timely filed Petition for Rehearing was denied on August 2, 1983. Jurisdiction is conferred by 28 U.S.C. §2101(c).

STATEMENT OF FACTS

The issues in this petition for review arise under the Administrative Procedure Act, 5 U.S.C. §551 et seq., the National Environmental Policy Act, 42

U.S.C. §4431 et seq. and Section 110(f) of the National Historic Preservation Act, 16 U.S.C. §470h-2(f).^{1/}

Plaintiffs allege arbitrary and capricious action by the Army Corps of Engineers in issuing permits for the Point Pleasant pumping station, one component of the Point Pleasant Water Diversion Project, without preparing an Environmental Impact Statement. The project was conceived in the 1960's to divert up to 150 million gallons of water per day from the Delaware River. The water was to be used as supplemental cooling water at the proposed Limerick Nuclear Power Plant located thirty miles away on the Schuylkill River in Limerick, Pennsylvania, and to supplement public drinking water supplies in Bucks and

^{1/} The text of these provisions is set forth in the Appendix hereto.

Montgomery Counties in Pennsylvania. The project, as originally conceived, has been scaled down significantly due to changes in population and need projections to 95 mgd^{2/}

The primary project proponents are defendant Philadelphia Electric Company (PECo), the intended user of approximately half the water, and defendant Neshaminy Water Resources Authority (NWRA) a municipal authority created by Bucks County inter alia, to pump and treat the water.

^{2/} Most recently, while the appeal was pending in the Third Circuit, the reasonably anticipatable need of PECO for the supplemental cooling water portion of the water was cut in half by the Pennsylvania Supreme Court in Pennsylvania Public Utility Commission v. Philadelphia Electric Company, 460 A.2d 734 (Pa. 1983), sustaining a Pennsylvania Public Utilities Commission decision ordering PECO to cancel or suspend one half of its project. Equally significantly, on May 17, 1983 in a Bucks County nonbinding referendum which its Commissioners have agreed to enforce, the voters mandated that the project be abandoned, and as a (Footnote continues on next page)

The pumping station is now under construction in the picturesque and historically significant village of Point Pleasant, prehistorically an important point of ferry crossing over the Delaware River, where the Delaware Canal is also located. The Canal has been designated as a National Historic Landmark, the highest form of designation under the National Register System. Point Pleasant contains significant archeological resources, and is a favorite spot along the Delaware River for fishing, tubing, and other recreational activities. Lower Black's Eddy, where the water intake is proposed to be located, is a spawning and nursery area for American Shad, denominated a major fishery resource by the

(Continuing footnote from previous page)
2/ result, the Bucks County Commissioners have taken numerous actions to halt the project. These efforts, so far only partially successful, are continuing as construction of the segment at issue herein also continues.

Commonwealth of Pennsylvania, 30 P.S.
§431.

The proposed pump station for which the Corps issued its permits consists of a intake structure composed of two 70 foot rows of screens and piping connected by three 300 foot long, 42 inch diameter conduits extending back into the river banks. The conduit would then combine and cross under the Delaware Canal and enter a pumphouse facility which would be elevated 65 feet, serviced by outdoor transformers located about 20 yards from the Canal. The water would be pumped through a transmission main up a steep hillside to a proposed Reservoir located some 2.4 miles away.

Segments of the project excluded from consideration by the Corps in its permit review and approval include the transmission main, the reservoir, the drinking water treatment plant (for which a separate permit was issued by the

Corps), and the ultimate uses.

Various aspects of the project were studied by different agencies over the past fifteen years, and many of the required permits for different components have been issued, over the continuous opposition of the relevant fisheries agencies.^{3/} However, other necessary elements of the proposed system are still in the initial planning and permitting stages. A construction permit, but not a operating permit, has been issued for Limerick.

The project was endorsed in a forty-four page Environmental Impact Statement (EIS) prepared by the Delaware River Basin Commission in 1973. Subsequently, in August, 1980, the DRBC prepared a supplemental Environmental

^{3/} Appeals from Pennsylvania Department of Environmental Resources permits are pending before the Environmental Hearing Board as 83-177-H et al.

Assessment (EA) and later gave the project another approval, while deferring historical review to the Corps of Engineers, and other aspects to the Pennsylvania P.U.C. and the NRC. This decision was challenged by groups and individuals, virtually all different than the present plaintiffs, in Delaware Water Emergency Group et al. v. Hansler et al., 536 F.Supp. 26 (E.D. Pa. 1981) aff'd per curiam, 681 F.2d 805 (3d Cir. 1982)^{4/}, (DELWEG).

In the DELWEG case, the DRBC argued that its 1981 decision was not final in that the NRC and the Corps of Engineers had not yet exercised their regulatory powers of review. The district court, accepting this argument, noted that the project would likely be

^{4/} Limerick had also been the subject of a challenge, in Environmental Coalition of Nuclear Power v. Nuclear Regulatory Commission, No. 75-1421 (3d Cir., Nov. 12, 1975) (Judgment Order).

the subject of two additional Environmental Impact Statements, one by the NRC and one by the Corps. DELWEG, supra, 536 F.Supp. at 46-47. The DRBC and also indicated that it could reopen its docket decision at any time, if significant new issues or circumstances come to light. Based partly on this understanding, the Court refused to require a further Impact Statement from the DRBC.^{5/}

The project never received the further in-depth environmental review predicted to and envisioned by the district court at the time the DELWEG decision was handed down. Despite its earlier assurances, the NRC has declined to address the issue of the project's adverse water quality impacts on the

^{5/} Plaintiffs herein filed a Petition to Reopen, in September, 1982, which the DRBC, after this action was instituted, denied. That action is one of the agency actions challenged in this proceeding, but is not part of this appeal.

Delaware River, claiming that that issue was finally settled by the DRBC. This issue is the subject of a pending administrative proceeding which the district court deemed not yet ripe for review, (Application of Philadelphia Electric Company, No. 50-352, 50-353 (NRC ALSB)).

On October 25, 1982 the Corps concluded that no EIS for the project as a whole or any segment was necessary, and issued a segmented Section 404 Clean Water Act and Section 10 Rivers & Harbors Act permit for the intake and Delaware Canal crossing, and Point Pleasant pump station on the basis of a twenty page, conclusory Environmental Assessment. It concluded that no significant environmental effects would occur, and adopted virtually wholesale the findings of other agencies which had not even purported to deal with some of the issues and failed to provide any independent analysis of

most environmental impacts. Objections of U.S. Fish & Wildlife Service and Pennsylvania Fish Commission were swept away by ignoring them or misstating their role. Fish & Wildlife's concern regarding cumulative effects of this and other proposed withdrawals on water quality and fish was dismissed with the claim that the diversion could be stopped by the flick of a switch. No independent consideration of alternatives was given, contrary to the requirements of NEPA, 42 U.S.C. §4332(E).

In one utterly transparent evasion of its responsibility, the Corps stated that the DRBC decision foreclosed any duty to find a minimally intrusive crossing location across the Delaware Canal, a Historic Landmark, for the pump station despite the requirements of the National Historic Preservation Act, compliance with which the DRBC had

specifically delegated to the Corps in an exchange of letters in July, 1980 and January, 1981. There the Corps took responsibility for ensuring that the historic resources of Point Pleasant would be adequately protected through compliance with the Historic Preservation Act.

An amendment to that Act enacted in December, 1980, Section 110(f), 16 U.S.C. §470h-2(f), after the DRBC had completed its review, imposed a heightened requirement on federal permitting agencies to undertake "to the maximum extent possible. . . such planning and action as may be necessary to minimize harm" to National Historic Landmarks. The Corps proclaimed that the DRBC's prior determination was dispositive notwithstanding the specific delegation of authority to the Corps, and notwithstanding the fact that the DRBC

review had been conducted prior to the enactment of Section 110(f).

This suit was filed on November 17, 1982, alleging that the Corps, DRBC, and NRC, violated of, inter alia, the National Environmental Policy Act, 42 U.S.C. §4332, et seq., Fish and Wildlife Coordination Act, 16 U.S.C. §661 et seq., National Historic Preservation Act, 16 U.S.C. §470 et seq. and the Administrative Procedure Act, 5 U.S.C. §706.

Plaintiffs filed a motion for preliminary injunction to enjoin the commencement of construction set for January 1, 1983. Plaintiffs alleged inter alia, that the Corps ignored relevant factors, acted arbitrarily and capriciously, failed and refused to coordinate with the relevant fisheries agencies, had predetermined the outcome of its review, made only paper compliance with the historic statute, and refused to consider other relevant aspects and

impact of the project, and alternatives in determining not to prepare an EIS or to require a less damaging location for the crossing.

The Court scheduled a hearing on the Motion, but later limited the proceedings almost entirely to argument of counsel based on the documents which were proffered by defendant Corps on November 30th, as its "administrative record". This was a two-carton set of miscellaneous documents selected and produced from the Corps' files, consisting mostly of reports favorable to the project and omitting some of the documents which challenged or undermined the favorable view. It also contained hundreds of pages of public hearing transcript and letters of opposition from Bucks County citizens.

The DRBC "record" produced during the proceedings was approximately

fifty pages long, consisting entirely of the official DRBC public record, and included none of the memoranda, studies, correspondence or communications underlying the DRBC's refusal to reopen its decision. Other defendants filed no record.

At the request of defendants, appellants filed a detailed trial plan including the names of some nineteen proffered witnesses, and listed some sixty-three exhibits thought not to be in the Corps' self-selected record, including memoranda by or of Corps personnel indicating their predisposition, as well as arbitrary action.

However, on November 30th, the Court ruled plaintiffs could not produce any witnesses except at the discretion of the court, if the court determined that it needed testimony to "educate" it (A164-169). However, the Court made that

determination wholly on the basis of the information actually contained in the record and the argument of counsel. Plaintiffs were not permitted to introduce extra-record evidence or testimony, with the exception of one witness, who was permitted to testify for one hour, to challenge or rebut the information contained in the two agency "records" and a few documents not objected to by defendants. Hence, plaintiffs were denied the right to prove evidentiary facts not contained within the self-selected ex parte administrative records which they alleged would prove that significant environmental impacts had been ignored or swept under the rug.

The motion for preliminary injunction was denied in a decision issued from the bench on December 15, 1982. Consistent with its evidentiary approach, the Court held that based "on

the record" before it, plaintiffs had failed to show that the Corps had acted arbitrarily or capriciously, or had failed to disclose significant effects, or to consider alternatives, or consult with the fish agencies (A21, 22, 26).

I. THE THIRD CIRCUIT'S DOCTRINE DENYING CHALLENGERS OF INFORMAL AGENCY DECISIONS THE RIGHT TO INTRODUCE EVIDENCE IS INCONSISTENT WITH THE INTENT OF THE ADMINISTRATIVE PROCEDURE ACT, THE DECISIONS OF THIS COURT, AND THE LAW OF OTHER CIRCUITS

This case presents the Court with an increasingly severe problem last addressed directly in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1970) and Camp v. Pitts, 411 U.S. 138 (1973), i.e., the right of challengers to an informal ex parte administrative action in a specific case to present evidence, including witnesses and documents, to prove well-pleaded allegations of arbitrary and capricious agency action violating the standards of Section 10(e)

of the Administrative Procedures Act, 5 U.S.C. §706(2) (A), as elaborated by this Court in Overton Park.

It brings to the Court a critical need to establish a rule, as enunciated by several Circuits, but rejected by, inter alia, the Third Circuit, that the "probing, in-depth review" required by the A.P.A., while not requiring a de novo hearing, does require that challengers be allowed to present evidence to prove their case.

It seeks this Court's determination such a right exists, as may be implied from this Court's recent decision stressing the existence of such procedures. Baltimore Gas & Electric Co. v. NRDC, ___ U.S. ___, 103 S.Ct. 2246, 51 L.W. 4678 (1983). There, this Court stressed the availability of "as full a presentation as desired" before the agency in individual cases in sustaining

a general rule-making by the NRC (51 L.W., at 4683).

In Overton Park, this Court ruled that in reviewing informal agency action a court is to engage in "substantial inquiry" and "a thorough, probing, in-depth review" of informal agency action. This Court reversed the circuit court's grant of summary judgment in favor of the agency based on litigation affidavits submitted by the parties, Id at 409, without reference at all to the administrative record, and without the challengers having been afforded the opportunity for discovery of the agency administrator (401 U.S., at 409).

This Court held that litigation affidavits submitted by the agency were mere "post-hoc rationalizations" of the agency action and, as such, could not provide a basis for judicial review. (Id. at 419).

Hence, the Court remanded the case for review based "on the full administrative record" (Id. at 420), noting that extra-record evidence should be admitted by the court if necessary to enable it to effectively review the administrative record. Indeed the Court admonished the lower court that:

"since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary. . . to require some explanation in order to determine if. . . the Secretary's action was justifiable under the applicable standard," Id. at 420.

On remand, the district court ruled that plaintiffs were "entitled to offer expert testimony to evaluate the investigation of alternative routes by the Secretary. . . [and] to show that there were in fact feasible and prudent alternative routes". Citizens to Preserve Overton Park v. Volpe, 335 F.Supp 873, 877 (W.D. Tenn. 1972). The court proceeded to conduct a

twenty-five day evidentiary hearing.

(Id. at 878).

In affirming without opinion the district court's ruling that deprived plaintiffs of the right to introduce evidence, the court below has acted directly contrary to the teaching of Overton Park. Plaintiffs' "Preliminary Hearing Plan" listed 19 witnesses. Only one was allowed to testify. Critical documents which had not been included in the Corps of Engineers "administrative record", including letters and memoranda to and from the Corps, memoranda of meetings or phone calls with Corps officials, which cast doubt on the Corps' stated basis for its decision, were refused admittance except by the largesse of the court.

The district court made it clear that it proceeded on the basis that: "the court has discretion to

permit [testimony outside the administrative record] where it would tend to advance specific allegations by the plaintiffs that the administrative record is deficient" (A146). (Emphasis added) Elaborating, the court stated: "I said it may be received; I didn't say it absolutely will be received (A149); "I [will] decide whether or not testimony is necessary to educate me" (A150).

The district court's action was consistent with the Third Circuit's repeated affirmance without opinion of lower court rulings which have denied a right to introduce extra-record evidence in review of informal agency actions.^{6/}

^{6/} E.g., Delaware Water Emergency Group et al. v. Hansler, 536 F.Supp. 26, 46 (E.D. Pa. 1981), aff'd, 681 F.2d 805 (3rd Cir. 1981); Philadelphia Council of Neighborhood Organizations v. Coleman, 437 F.Supp. 1341 (E.D. Pa. 1978), aff'd, 578 F.2d 1375 (3d Cir. 1978); but see, Township of Springfield v. Lewis, 18 ERC 1978 (3rd Cir. 1983).

In upholding such constricted review, the Third Circuit has not only defeated the strictures of this Court under the Administrative Procedures Act, but has seriously weakened the traditional common law right to present evidence in an effort to control administrative action. Thus, in Greene v. McElroy, 360 U.S. 474 (1959) this Court stated that an aggrieved individual's right to confront and cross examine evidence supporting an agency decision is one of the "immutable [principles] in our jurisprudence", (Id at 496), and reflects "the Court's concern that the traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers", (Id at 508).

The Second, Fifth and D.C. Circuits have repeatedly followed the Overton Park rationale and held that

challengers of informal agency action "on the administrative record" have a right to introduce "extra-record evidence, particularly in cases under the National Environmental Policy Act, to prove that the record itself is deficient. E.g., County of Suffolk v. Secretary of Interior, 502 F.2d 1368 (2d Cir. 1977); Izaak Walton League of America v. Marsh, 655 F.2d 346, 369, n.56 (D.C. Cir. 1981); Image of Greater San Antonio Texas v. Brown, 570 F.2d 517, (5th Cir. 1978). Other Circuits, however, have questioned challengers' right to introduce extra-record evidence.^{7/}

This Court has repeatedly stated that although NEPA established

^{7/} E.g., Grazing Field Farms v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980); Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1028 (4th Cir. 1975) cert den. 423 U.S. 912 (1975). See also, Asarco v. E.P.A., 616 F.2d 1153 (9th Cir. 1980).

significant substantive goals for the nation, its mandate to the agencies is "essentially procedural, i.e., to ensure a fully informed and well considered decision". Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978); Stryker's Bay v. Karlen, 444 U.S. 223, 227 (1979). In Kleppe v. Sierra Club, 427 U.S. 390 (1976) this Court stated:

NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by "all practicable means, consistent with other essential considerations of national policy" [citation omitted]. Section 102(2)(C), is one of the "action - forcing" provision intended as a directive to "all agencies to assure consideration of the environmental impact of their actions in decision-making".^{8/} Conference Report on

8/ Section 102(2)(C) requires a detailed statement on the environmental impact of the proposed action, including discussion of unavoidable adverse effects of the action, alternatives, short-term and long-term benefits irretrievable commitment of resources; and requires consultation with all relevant federal agencies, and inclusion of their comments with the proposal through all stages of the review process. 42 U.S.C. §4332(2)(C).

NEPA, 115 Cong. Rec. 40416 (1969)
(Id. at 409). (Emphasis added)

This Court went on to state in Kleppe that it is the reviewing court's duty to ensure the fulfillment of Congress intent to assure such consideration during the agency's development of a proposal, or during its formulation of a position on a proposal submitted by private parties, Id., and that during this process the agency takes a "hard look" at all the environmental consequences. (Id. at 410, n.21) Accord, Baltimore Gas & Electric Co. v. NRDC, supra, 51 L.W. at 4678. That case, reaffirming Overton Park, stressed the Court's duty is to enforce the twin purposes of NEPA, the duty to "consider every significant aspect of the environmental impact", and to disclose them, and "that its decision is not arbitrary or capricious" (51 L.W. at 4680). The procedures governing the

rulemaking at issue there are very different from those applicable to this action by the Corps.

But if the reviewing court's task under NEPA is to determine whether the environmental consequences were fully reviewed and considered during the agency decision-making process, then for a reviewing court to prevent challengers from presenting evidence to support well-pleadings allegations that the "bare administrative record" does not reflect whether the consequences were considered and disclosed, or whether consequences were never identified, or were excluded from the record, in case of informal agency decisionmaking, defeats the purpose of this Court's holdings. Persons challenging informal agency action on a specific project, as distinguished from rulemaking or decision based on an adversary record, should be allowed

as a matter of right, to prove their case. While this is true generally under Overton Park, it is particularly important in NEPA cases.

In County of Suffolk, supra, a leading case, the Second Circuit explained that extra-record evidence is an essential means for challengers to establish that the "record" compiled by an agency under NEPA is itself deficient:

Generally. . . allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept "stubborn problems or serious criticism under the rug" [citation omitted] raises issues sufficiently important to permit the introduction of new evidence in the district court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an EIS [footnote citations omitted] and in suits attacking an agency determination that no such statement is necessary [footnote citations omitted]. (502 F.2d, at 1385).

In Como-Falcon Coalition, Inc. v. U.S. Department of Labor, 465 F.Supp. 850,

858, n.1, (D.Minn. 1978) mod oth gr 609
F.2d 342 (8th Cir. 1979) cert den 446
U.S. 936, this reasoning was further
explicated:

If the federal agency has overlooked or inadequately assessed a possible adverse environmental impact, it is unlikely that the deficiency will be apparent from examination of the record itself. Given the scheme of NEPA and the scrutinizing with which the judiciary must eye negative assessments of environmental impact, a reviewing court cannot be restricted to the administrative record.

See also, Sierra Club v. U.S. Corps of Engineers, 701 F.2d 1011, 1031 (2d Cir. 1983).

In a line of cases commencing with Save Our Ten Acres v. Kreger, 472 F.2d 463 (1973), the Fifth Circuit has linked the challengers' right to introduce extra-record evidence to their burden of proof, holding that once challengers have alleged facts which, if true, show that the recommended project

would materially degrade any aspect of environmental quality, the court must examine and weigh the evidence of both sides to determine whether the agency action was "reasonable".^{9/} See also, Louisiana Environmental Society, Inc. v. Dole, 707 F.2d 116, 120, n.4 (5th Cir. 1983); Manatee County v. Gorsuch, 554 F.Supp. 778, 782 (M.D. Fla. 1982).

This right is even more essential where, as here, the agency has determined not to prepare an EIS and therefore has not prepared and circulated a draft EIS, which would afford the agencies and public at least an opportunity to review and comment to ensure that the agency has identified all the

^{9/} The district court found in this case that plaintiffs had met that initial burden (A16). Hence, under the Fifth Circuit's rule extra-record evidence would have been allowed.

effects and taken a hard look. Baltimore Gas Co. v. NRDC, supra, 51 L.W. at 4680.

In attempting to deny challengers the right to introduce extra-record evidence to challenge informal ex parte agency action, courts in the Third and other Circuits, have acted on the basis of a misunderstanding of this Court's decisions in Camp v. Pitts, 411 U.S. 138, 142 (1973) and Vermont Yankee Nuclear Power Corp v. NRDC, 435 U.S. 519 (1978). In Philadelphia Council, supra, the district court stated that Camp v. Pitts, when read with Overton Park, "clearly mandate[s] that. . . the court. . . should confine its inquiry to the administrative record" (437 F.Supp. at 1348). This is clearly a misreading of this Court's ruling.

What this Court actually held in Camp v. Pitts was that the "focal

* point for judicial review should be the administrative record already in existence" (411 U.S. at 142) (emphasis added), and not a de novo trial. It is a total distortion to read this as precluding challengers' right to introduce extra-record evidence to test that record. In Camp v. Pitts itself the Fourth Circuit had found insufficient basis in the administrative record to uphold a determination by the Comptroller of Currency. Having determined the record to be deficient, the appeals court remanded to the district court for a trial de novo, specifying that a wholly new record would be created and a decision rendered on the basis of the evidence introduced at trial (Id. at 140). This Court struck down that remand order, holding that the validity of ~~the~~ Comptroller's decision must be judged on the basis of "the administrative record" and that if it is

not sustainable on that basis the matter must be remanded to him. However, this determination did not preclude the reviewing court from taking additional evidence to test the administrative record. In fact, this Court stated:

The Court of Appeals should determine whether, and to what extent, in the light of the administrative record, further explanation is necessary to a proper assessment of the agency's decision (Id. at 143) (Emphasis added).

Hence, Camp v. Pitts, by its very terms, held that a challenge to informal agency action may require the introduction of extra-record evidence. That Camp did not decide directly that challengers have a right to introduce evidence is hardly surprising, since that issue was not before the Court.

The Camp - Overton principle that a reviewing court must focus its inquiry on the administrative record rather than creating an entirely new

record should not be extended beyond its intended purpose, i.e., that the agency must justify its decision on the basis of what is found in the record. Accord, Motor Vehicle Mfrs. Ass'n. v. State Farm M.A. Ins. Co., ___ U.S. ___, 103 S.Ct 2856, 2870 (1983). It does not dictate the exclusion of extra-record evidence which is offered to challenge the sufficiency of that record. As the Ninth Circuit stated in Asarco, Inc. v. U.S. E.P.A., 616 F.2d 1153 (9th Cir. 1980):

It is both unrealistic and unwise to "straitjacket" the reviewing court with the administrative record. It will often be impossible especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all the relevant factors unless it looks outside the record to determine that matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters. Id. at 1160.

There is no reason to believe that this

Court ever intended to deprive litigants of the right to introduce extra-record evidence to show that the agency has not done its job, and it should not do so now.

Similarly, this Court's opinion in Vermont Yankee and Baltimore Gas & Electric cannot be read to deny the challengers' right to introduce extra-record evidence in an ex parte project decision. In Vermont Yankee, this Court held that the appellate court had erred in the course of reviewing the promulgation of an agency rule by imposing procedural requirements that went beyond those imposed by the Administrative Procedures Act, 5 U.S.C. §553 (435 U.S. at 525). In this context, the Court reaffirmed the Camp v. Pitts holding that the validity of the action must be tested by "the administrative record", and that the reviewing court should not "stray

beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are "best". Id. See, Motor Vehicle Mfrs. Ass'n. v. State Farm, supra.

Similarly, Baltimore Gas & Electric, supra involved generic rule-making, not an individual case decision. Indeed, there, this Court stressed that the right of parties to make "as full a presentation as desired" had been preserved prior and subsequent to the challenged rule. (51 L.W., at 4683).

This Court has traditionally accorded a high degree of deference to agency rulemaking. Batterton v. Francis, 432 U.S. 416, 425, n.9 (1976). As Professor Jaffe stated, the very delegation of formal rulemaking power recognizes an area of discretion which restricts a court to the question of

whether a regulatory term is consistent with the statutory term and purpose. Jaffe, Judicial Control of Administrative Action, 564-65 (1965).

Thus, this Court's admonition to reviewing courts in Vermont Yankee not to impose their own notion of procedure into the review of agency rulemaking is primarily directed towards ensuring that the judiciary does not overstep its bounds into the quasi-legislative realm of agency rulemaking, and hence is not applicable to review of specific informal agency action. Even in the rule-making area, in Baltimore Gas & Electric, this Court in stressing the "careful consideration and disclosure required by NEPA"; noted the fact that hearing and adversary testimony were afforded prior to the NRC's action. (51 L.W., at 4681) And in Motor Vehicle Mfs. Ass'n. v. State Farm, supra, 103 S.Ct. at 2870, this Court

warned against reading Vermont Yankee, "as though it were a talisman under which any agency decision is by definition unimpeachable". (51 L.W., at 4958)

As suggested in Overton Park, and implied from Baltimore Gas & Electric, supra, the crux of the issue in the case of ex parte informal agency action is that challengers are never given an adversary forum before the agency in which to present proof and evidence for their contentions to an impartial decision-maker, nor an opportunity to review and rebut the agency's claims. Compare Baltimore Gas & Electric, supra. This situation contrasts sharply with the case where the agency itself provides a full, formal adjudicatory proceeding in which intervenors have an opportunity to present complete supporting factual evidence on their claims under NEPA and, hence, the issues can be fully fleshed

out before the agency. See, e.g.,
Vermont Yankee, supra, 435 U.S. at
526-27. Baltimore Gas & Electric, supra.

Where the agency gives challengers no such forum, and if they are not given a forum in court, then the supporting proof and evidence are never heard. Such a deprivation is particularly significant when, as here, the agency determines not to prepare an EIS. Where an EIS is prepared, NEPA requires circulation of a draft EIS, giving others at least the opportunity to review and rebut the agency's intended findings. Here, the Pennsylvania Fish Commission learned that the Corps erroneously believed it need not consider the Commission's opposition because it erroneously believed that another state agency spoke for the state.

Refusal to allow challengers to present evidence to prove their case

defeats this Court's mandate in Overton Park that a reviewing court must engage in a "thorough, probing, in-depth review" of agency action and deprives them of the opportunity to meet their burden of establishing a likelihood of success in proving that the agency acted arbitrarily and capriciously.

The perpetuation of this doctrine will, more broadly, seriously undermine this Court's mandate under the APA and NEPA that administrative agencies must comply with the law; it will result in agencies' decisions being by definition unimpeachable, without even a talisman. This Court's present action is required to prevent this result.

II. SECTION 110(f) OF THE NATIONAL HISTORIC PRESERVATION ACT, 16 U.S.C. §470h-2(f) REQUIRED THE CORPS TO ADOPT ACTIONS TO MINIMIZE HARM TO A NATIONAL HISTORIC LANDMARK

This case of first impression under Section 110 (f) of the National

Historic Preservation Act, 16 U.S.C. §470h-2(f), seeks to mandate compliance with the philosophy of this Court's mandate in Overton Park implementing Congress' intent to "curb the accelerating destruction of our country's natural beauty". Overton Park, supra, 401 U.S. at 404.

In December, 1980, Congress accorded a high degree of protection to National Historic Landmarks similar to that which Section 4(f) of the Department of Transportation Act, (DOTA) 49 U.S.C. §1653(f), had given to parklands and historic sites. It extended that protection, from transportation projects covered in Section 4(f) of the DOTA, to all "federal undertakings," defined to include all projects requiring federal permits.^{10/}

^{10/} The term "undertaking", as used in Section 110(f) is defined at 16 U.S.C. (Footnote continues on next page)

Section 110 (f) was enacted to ensure "a higher standard of care to be exercised by federal agencies when considering undertakings that may directly and adversely affect national historic landmarks", H.R. Rep. No. 96 - 1457, 96th Cong., 2d Sess. 38 (1980). Section 110(f) states:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic

(Footnote from previous page)

10/ §470w(7) to mean "any action as described in [16 U.S.C. §] 470f." The actions described in 16 U.S.C. §470(f) include "undertakings which any federal department or agency has authority to license." Furthermore, Section 110(d), 16 U.S.C. §470h-2(d), provides in part that "all Federal agencies shall carry out agency programs and projects (including those under which . . . any federal license, permit or approval is required) in accordance with the purpose of Sections 470 to 470a, 470b, and 470c to 4702-6". Section 110(f) is included within these sections.

Preservation a reasonable opportunity to comment on the undertaking. 16 U.S.C. 470h-2(f). (Emphasis added).

The Corps of Engineers failed to undertake maximum possible planning and action to protect the Delaware Canal, a National Historic Landmark, by failing to identify, consider or adopt a canal crossing location which would minimize harm to the Canal.

The Delaware Canal is a fifty-seven mile facility in the Philadelphia metropolitan area similar in appearance and character to the C&O Canal along the Potomac. Built in the 1820's, it is today a National Historic Landmark and state park, visited annually by millions for canoeing, fishing, and towpath walking, jogging, etc.^{11/}

^{11/} On October 23, 1983, the tragic death of television reporter Jessica Savitch occurred in the Delaware Canal at New Hope, PA, some eight miles from Point Pleasant.

Point Pleasant is one of the most scenic and accessible stretches of the Canal, boasting two locks, two stream crossings, and two separate Landmark structures, and is set back from the highway in an unspoiled scenic context. The diversion project would locate a pump station elevated 65 feet above the Canal level, with exposed transformers for the pumps and parking lots facing the Canal from about twenty yards away.

Section 110(f) was enacted for the purpose of giving special protection to Landmarks such as the Delaware Canal at Point Pleasant. As this Court stated in Overton Park:

[T]he very existence of the statute indicated that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present. . . (401 U.S. at 413).

Both the language and legislative history

of Section 110(f) indicate that it was intended to closely mirror the requirements of Section 4(f) of the DOTA, which states, in relevant part:

[T]he secretary shall not approve any program or project which requires the use of any publicly owned land from a public park... unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park... 82 Stat. 82 4, 49 U.S.C. § 1653(f) (1964 ed., Supp. V)

Drawing upon experience with the earlier Section 4(f), the Congress substituted the requirements of "maximum. . . planning and actions" to minimize harm to the Landmark for the Section 4(f) prohibition against approving an action for which a "feasible and prudent alternative" exists.

Having thus achieved their action - forcing purpose within the overall planning, the "no prudent and feasible alternative" requirement of

Section 4(f) was deleted. However, consideration of prudent and feasible alternatives as part of maximum possible action to minimize harm was considered as a component of the requirement of the strengthened mandate to take "maximum... planning and actions... to minimize harm." The Committee Report summarized:

Although the Committee deleted a mandatory requirement that an agency first determine that no prudent or feasible alternative to such undertaking exists, the Committee does intend for agencies to consider prudent and feasible alternatives.

H.R. Rep. No. 96-1457, at 38 (1980).

There is no dispute that the Corps did, indeed, not only wholly fail to consider alternative projects to one which would necessitate crossing the Canal, but also such actions to minimize harm as choosing any other Canal crossing locations than the one at Point Pleasant. On the contrary, the Corps asserted that Section 110(f) did not mandate even

identification, much less adoption, of minimally intrusive crossing sites and asserted, on the contrary, that the Corps was bound by the DRBC's choice of Point Pleasant for the crossing of the Delaware Canal (A132). This position was taken despite the facts that the DRBC's review had occurred prior to the passage of Section 110(f), and that DRBC had specifically delegated responsibility for compliance with the Historic Preservation Act to the Corps. The district court found that the Corps was entitled to rely on the DRBC's prior approval of the Point Pleasant location as "conclusive" (A19-20, A46) and that neither the Corps or the DRBC had a duty to examine alternative locations under Section 110(f) in any event (A47).

Thus, there was no action by any agency to minimize harm to the Landmark. This sanctions a total mockery

of the Congressional mandate.

Even assuming, arguendo, that the Corps was entitled to assume that the Delaware Canal could be crossed at some location, without even considering the many potential project alternatives, this did not discharge its Section 110(f) duty to adopt the least possible harmful point of crossing. Consistent with this Court's fulsome Overton Park teaching, the provision of Section 4(f) of the DOTA requiring "all possible planning to minimize harm" has been interpreted by Circuit Courts to require consideration of alternative locations within a protected area, after it has been determined that no prudent and feasible alternative exists to the encroachment on some portion of that protected area. The Fifth Circuit has stated that once the "no prudent and feasible" alternative test is met:

The relocation of a highway through another portion of a recreational area must be considered as a means of minimizing harm to the area [citations omitted]. This requires a simple balancing process which would total the harm to the recreational area of each route and select the route which does the least harm.

Louisiana Environmental Society Inc. v. Coleman, 537 F.2d 79, 85-86 (5th Cir. 1976). Similarly, the D.C. Circuit has stated that:

"the evaluation of harm [under Section 4(f)] requires a far more subtle calculation than merely totalling the number of acres to be asphalted. For example, the location of the affected acres in relation to the remainder of the parkland may be a more important determination, from the standpoint of harm to the park, than determining the number of affected acres.

D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1239 (D.C. Cir. 1972).

This interpretation that the less stringent "planning to minimize" language of Section 4(f) requires

implementation of locations within a protected area which must be crossed is a fortiori as to the Corps' responsibility under Section 110(f) to take maximum possible action to adopt a minimally damaging crossing site along the Delaware Canal.

The Corps' reliance on the DRBC's choice of Point Pleasant as the Canal crossing site fails for two reasons. First, the DRBC never conducted a review of Canal crossing sites under the standards imposed by Section 110(f), because the statute was not enacted until several month after the DRBC's update review was completed.^{12/} Moreover, the DRBC, acknowledging its inability to

^{12/} DRBC's Environmental Impact Statement selecting Point Pleasant was completed in 1973, before the Canal was made a Landmark; its update Assessment was issued in August, 1980, before enactment of Section 110(f).

conduct an adequate review under the National Historic Preservation Act, specifically delegated that duty to the Corps (Finding of Fact 90, A95). Hence, because the Corps refused to examine or select Canal crossing sites outside Point Pleasant which would minimize harm as required by Section 110(f), compliance was never made at all by anyone.^{13/}

Permitting the maiming of the Delaware Canal without an effort to minimize the intrusion directly flouts the Congressional mandate. Where a statutory requirement exists under standards and for the purposes imposed by that statute, compliance is not presumed by virtue of the fact that some consideration may have taken place under other

^{13/} Plaintiffs' proffer of witnesses to testify that the Corps recital of compliance with Section 110(f) was mere paper compliance" was not accepted by the District Court.

standards. As Justice Frankfurter once stated: "in administrative law we are dealing preeminently with law in the making; with fluid tendencies and tentative traditions:", Frankfurter, "The Task of Administrative Law", 75 U.Pa.L.Rev. 614, 619 (1927).

This Court has found it necessary to remand a decision to an administrative agency for reconsideration in light of a new agency circular promulgated by that very agency subsequent to the original action taken, noting that, "the legal effect of the circular, the extent to which it binds local. . . authorities, and whether it is in fact applicable to the petitioner are questions we do not now decide". Thorpe v. Housing Authority of Durham, 386 U.S. 670, 673, n.4 (1966). See also, Soric v. Immigration and Naturalization Service, 382 U.S. 285 (1965) (remand to

Immigration and Naturalization Service for reconsideration of denial of alien's application in light of intervening amendments to that Act); Roe v. Norton, 422 U.S. 391 (1974) (remand of dispute as to whether state welfare statute conflicts with Social Security Act for reconsideration in light of amendments to the federal Act). The Circuit Courts have also required this.

As the Ninth Circuit stated:

[A] court reviewing the Secretary's 4(f) decision must satisfy itself that the Secretary evaluated the . . . project with the mandates of Section 4(f) clearly in mind [cite omitted]. On the administrative record, the Secretary's consistent position was not that he had complied with Section 4(f) but that the statute was altogether inapplicable. In light of that consistently recorded position, it is not possible, with factual accuracy, to conclude that the Secretary evaluated [the project] with the explicit directives of 4(f) firmly in mind.

Stop H-3 Association v. Coleman, 533 F.2d 434, 445 (9th Cir. 1976), cert den., sub

nom Wright v. Stop H-3 Association, 429 U.S. 999. See also, Harrisburg Coalition Against Ruining the Environment v. Volpe, 330 F.Supp. 918 (M.D. Pa. 1971) (remand to agency for new 4(f) determination after Overton Park where the D.O.T. Secretary could not have "anticipate[d] the new light" cast on Section 4(f) decisionmaking by that Supreme Court ruling).

DRBC's consideration of crossing sites, made before the passage of Section 110(f), under different standards and for different purposes, could not fulfill the Section 110(f) mandate.

The Corps argued not only that it was entitled to rely on the DRBC's consideration of alternatives but that it was bound by DRBC's selection of the Point Pleasant location by virtue of a unilateral provision added by Congress in adopting and consenting to the Compact

which states that whenever the DRBC has made an addition to its comprehensive plan (such as the addition of this water diversion project) the exercise of powers by any federal agency "shall not substantially conflict" with such addition. Delaware River Basin Compact, 87-328, 72 Stat. 688, §15.1(s) (1961).

The short answer is that whatever the effect of this provision on the Corps might have been if the DRBC had in fact made a review here, the DRBC did not do so but in fact specifically delegated NHPA compliance to the Corps. The Corps is not entitled to act in derogation of Section 110(f)'s requirements because of a feared conflict with a DRBC decision.

More broadly, Section 15.1(s) of the Compact merely state that projects should not contradict DRBC's approvals. It does not state that DRBC approval is a

binding mandate that the project actually be brought into existence. Hence, an independant exercise of jurisdiction which results in disapproval of a component of the plan, for reasons not considered by the DRBC in its approval, is not an action which "substantially conflicts" with a DRBC plan. In any event, there is no indication that Congress intended, by its addition of Section 15.1(s) as a unilateral Congressional enactment in approving the DRBC Compact, to limit its own later enactment of federal law. This case is thus unlike Texas v. New Mexico, ___ U.S. ___, 103 S.Ct. 2558 (1983) in which this Court ruled that where Congress has given approval to an Interstate Compact a court may not alter the terms of that Compact though an exercise of its equity jurisdiction. (Id., at 2565. Hence, the Corps' assumption of a Point Pleasant

location and its refusal even to undertake a Section 110(f) review to determine whether other Canal crossing sites would minimize harm to the environment, is specious.

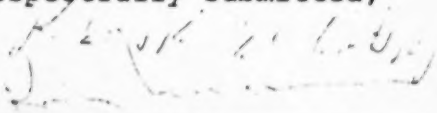
Section 110(f) was enacted to require more stringent care for Landmarks than was occurring under Section 106 of the NHPA, 16 U.S.C. §470(f) which required consultation for all National Register sites. It is ironic that this Landmark got less care. There is urgent need to insure that agencies comply with the Congressional mandate of Section 110(f), as there was in 1971, with regard to Section 4(f). Our Nation's Historical Landmarks are rare and irreplaceable, and Congress' specific commands should be fulsomely honored, not sloughed aside.

CONCLUSION

For the foregoing reasons,

petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,



ROBERT R. ELLIOTT
ROBERT J. SUGARMAN
ROBIN T. LOCKE

Counsel for Petitioners

Of Counsel:

ELLIOTT & BELL, P.C.
1201 Pennsylvania Ave. N.W.
Suite 803
Washington, D.C. 20004
(202) 887-5858

SUGARMAN & DENWORTH
121 S. Broad Street
Suite 510
Philadelphia, PA 19107
(215) 546-0162

Dated: October 31, 1983
140

APPENDIX TO BRIEF

National Environmental Policy Act, 42
U.S.C. 4332:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall-

X X X

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

- (i) the environmental impact of the proposed action.
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the

proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statements and the comments and view of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

X X X

(E) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

National Historic Preservation Act, 16
U.S.C. §470H-2(f):

(f) Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

Administrative Procedures Act, 5 U.S.C.
§706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

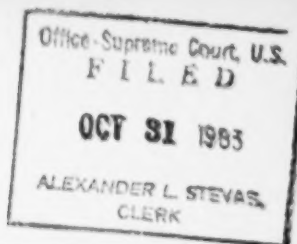
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by reviewing court

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

140

83-740



NO.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED INC., et al.,
Petitioners,

v.

ROGER W. BALDWIN, District Engineer,
United States Corps of Engineers, et al.
Respondents

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROBERT R. ELLIOTT
ELLIOTT AND BELL, P.C.
1201 PENNSYLVANIA AVE., N.W.
SUITE 803
Washington, D.C. 20004
(202) 887-5858

ROBERT J. SUGARMAN
ROBIN T. LOCKE

Of Counsel:

Counsel for Plaintiffs

SUGARMAN & DENWORTH
121 S. Broad Street
Suite 510
Philadelphia, PA 19107
(215) 546-0162

Dated: October 31, 1983

TABLE OF CONTENTS

1.	Judgment Order and Order Sur Petition for Rehearing.....	1
2.	Order of the District Court December 12, 1982.....	5
3.	Bench Opinion with Correction Sheet December 15, 1982.....	7
4.	NWRA Proposed Findings of Fact (Adopted by the District Court).....	71
5.	Corps of Engineers Statement of Findings U.S. District Court November 30, 1982..	114
6.	Corps of Engineers Environmental Assessment.....	142
7.	Transcript, pages 1 - 8, 103.....	161

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1010

DELAWARE UNLIMITED, INC.; SIGSTEDT, VAL; WELLS, COLLEEN;
SADOUX, MARC; MASLAND, MARION W.; TOWNSHIP OF BRISTOL;
TORKELSON, NORMAN and DIANE; THE PHILADELPHIA FEDERATION OF
SPORTSMEN'S CLUBS; LANDIS, SAMUEL; GILMORE, CHARLES;
NOBLE, MARY ELLEN; THE PENNSYLVANIA STATE FEDERATION OF
SPORTSMEN'S CLUBS; BANNING, RITA C., HONORABLE; WATERSHED
ASSOCIATION OF THE DELAWARE RIVER; GREENWOOD, JAMES C.,
HONORABLE; POWASH, CARL, HONORABLE,

Appellants

v.

ROGER W. BALDWIN, individually, and as District Engineer,
U.S. Army Corps of Engineers; ALEXANDER ALDRICH, individually,
and as Chairman of the Advisory Council on Historic
Preservation; WILLIAM GORDON, individually, and as
Assistant Secretary, U.S. Department of Commerce;
GERALD HANSLER, individually and as Executive Director,
The Delaware River Basin Commission; HAROLD DENTON,
individually, and as Director, Division of Nuclear Reactor
Regulation, U.S. Nuclear Regulatory Commission; THE NUCLEAR
REGULATORY COMMISSION; HONORABLE PETER DUNCAN, as Secretary
of the Department of Environmental Resources of the
Commonwealth of Pennsylvania; WESHAMINY WATER RESOURCES
AUTHORITY; and PHILADELPHIA ELECTRIC COMPANY

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 82-5115)
District Judge: Honorable James Giles

Argued June 13, 1983

Before HUNTER, HIGGINBOTHAM, Circuit Judges, and
IEGLER,* District Judge

*Honorable Donald E. Iiegler, United States District Judge for
the Western District of Pennsylvania, sitting by designation

JUDGMENT ORDER

Appellants appeal from an interlocutory order of the district court denying appellants' motion for preliminary injunction. After consideration of all contentions raised by appellants, to wit, that the court erred:

- 1) as a matter of law by excluding from evidence virtually all of appellants' proffered testimony and documentation which was not included in the Corps' administrative record;
- 2) in holding that section 110(f) of the National Historic Preservation Act did not require the Corps to implement measures and consider alternatives which would minimize harm to the Pennsylvania Canal;
- 3) in finding that the Corps had given "great weight" to the views of the state and federal fisheries agencies, as required by its statute and regulations;
- 4) in finding insufficient likelihood of success on the merits of the NEPA claims to require injunctive relief,

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

Certified as a true copy and issued in lieu of a formal mandate on August 18, 1983.

Test:

Clerk, United States Court of Appeals for the Third Circuit.

BY THE COURT,

James H. Mower, III
JAMES MOWER, III, Circuit Judge

Attest:

M. Elizabeth Ferguson
Chief Deputy Clerk

Dated: July 5, 1983

COPY

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1010

DEL-AWARE UNLIMITED, INC.; SIGSTEDT, VAL; WELLS, COLEEN;
SADOUX, MARC; MASLAND, MARION W.; TOWNSHIP OF BRISTOL;
TORKELSON, NORMAN and DIANE; THE PHILADELPHIA FEDERATION OF
SPORTSMEN'S CLUBS; LANDIS, SAMUEL; GILMORE, CHARLES;
NOBLE, MARY ELLEN; THE PENNSYLVANIA STATE FEDERATION OF
SPORTSMEN'S CLUBS; BANNING, RITA C., HONORABLE; WATERSHED
ASSOCIATION OF THE DELAWARE RIVER; GREENWOOD, JAMES C.,
HONORABLE; FOMASH, CARL, HONORABLE,

Appellants

v.

ROGER W. BALDWIN, individually, and as District Engineer,
U.S. Army Corps of Engineers; ALEXANDER ALDRICH, individually,
and as Chairman of the Advisory Council on Historic
Preservation; WILLIAM GORDON, individually, and as
Assistant Secretary, U.S. Department of Commerce;
GERALD HANSLER, individually and as Executive Director,
The Delaware River Basin Commission; HAROLD DENTON,
individually, and as Director, Division of Nuclear Reactor
Regulation, U.S. Nuclear Regulatory Commission; THE NUCLEAR
REGULATORY COMMISSION; HONORABLE PETER DUNCAN, as Secretary
of the Department of Environmental Resources of the
Commonwealth of Pennsylvania; MESHAMINY WATER RESOURCES
AUTHORITY; and PHILADELPHIA ELECTRIC COMPANY

SUB PETITION FOR REHEARING

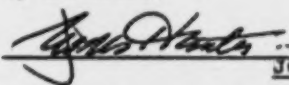
Present SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER,
WEIS, CARTE, HIGGINBOTHAM, BECKER, Circuit Judges

The petition for rehearing, filed by

APPELLANTS

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,



Judge

Dated August 2, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RECEIVED

DEC 22 1982

DEL-AWARE UNLIMITED, INC., et al. : CIVIL ACTION
v. :
ROGER M. BALDWIN, et al. : NO. 82-5115

SUGARMAN AND GERNERTH

ORDER

FILED DEC 17 1982

AND NOW, this 17th day of December, 1982, in accordance with the bench opinion rendered December 15, 1982, it is hereby ORDERED that:

1. The claims asserted by plaintiffs under the Rivers and Harbors Act, 33 U.S.C. § 401, et seq., the Clean Water Act, 33 U.S.C. § 1365, et seq., the Endangered Species Act, 16 U.S.C. § 1540, et seq., and the National Historic Preservation Act, 16 U.S.C. § 470, et seq., are DISMISSED for lack of jurisdiction.

2. Plaintiffs' claims against the Nuclear Regulatory Commission, and Harold Denton in his individual and official capacity are DISMISSED for lack of jurisdiction.

3. Plaintiffs' claims against the Department of Environmental Resources of the Commonwealth of Pennsylvania (PDER), and Peter Duncan in his official capacity as Secretary of PDER, are DISMISSED for lack of jurisdiction. In the alternative, these claims are DISMISSED on the basis of comity and this court's determination not to exercise pendent

ENTERED: 12-20-82

CLERK OF COURT

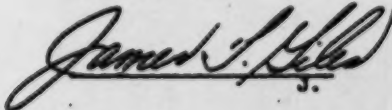
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jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

4. Plaintiffs' claims against Roger Baldwin, District Engineer, U.S. Army Corps of Engineers, Alexander Aldrich, Chairman of the Advisory Council on Historic Preservation, William Gordon, Assistant Secretary, U.S. Department of Commerce, and Gerald Hansler, Executive Director of the Delaware River Basin Commission (DRBC), in their individual capacities, are DISMISSED.

5. Plaintiffs' motion for preliminary injunction as to the remaining defendants asserted under the National Environmental Policy Act (NEPA), 16 U.S.C. § 150, et seq., the Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq., and under common law with respect to the DRBC, is DENIED. Whether singly or cumulatively, the issues raised by plaintiffs are insufficient on the record evidence to show that defendants acted unreasonably, arbitrarily or capriciously in determining that an Environmental Impact Statement was not required and in rendering a negative declaration as to the planned construction of the Point Pleasant Water Diversion Project.

BY THE COURT:

James T. Gilh

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE UNLIMITED, INC., : CIVIL ACTION
VAL SIGSTEDT, COLLEEN WELLS, MARC :
SADOUX, MARION W. MASLAND, Township :
of Bristol, NORMAN and DIANE :
TORKELSON, The PHILADELPHIA :
FEDERATION OF SPORTSMEN'S CLUBS, :
SAMUEL LANDIS, CHARLES GILMORE, :
MARY ELLEN NOBLE, THE PENNSYLVANIA :
STATE FEDERATION OF SPORTSMEN'S : NO. 82-5115
CLUBS, HONORABLE RITA C. BANNING, :
WATERSHED ASSOCIATION OF THE :
DELAWARE RIVER, HONORABLE JAMES C. :
GREENWOOD AND HONORABLE CARL FONASH. :
Plaintiffs

vs.

ROGER M. BALDWIN, individually and :
as District Engineer, U.S. Army :
Corps of Engineers, and :
ALEXANDER ALDRICH, individually :
and as Chairman of the Advisory :
Council on Historic Preservation, :
WILLIAM GORDON, individually and :
as Assistant Secretary, U.S. Dept. :
of Commerce, GERALD HANSLER, :
individually and as Executive :
Director, The Delaware River :
Basin Commission, HAROLD DENTON, :
individually and as Director, Division :
of Nuclear Reactor Regulation, U.S. :
THE NUCLEAR REGULATORY COMMISSION, :
HONORABLE PETER DUNCAN, as Secretary :
of the Department of Environmental :
Resources of the Commonwealth of :
Pennsylvania, WESHAMINY WATER :
RESOURCES AUTHORITY, and :
PHILADELPHIA ELECTRIC COMPANY, :
Defendants.

December 15, 1982

BEFORE: HONORABLE JAMES T. GILES, J.

Reported by:
Sidney Rothschild OFFICIAL COURT REPORTERS
Room 2702
U.S. Courthouse
Philadelphia, Pa. 19106

WAlmut 6-9490

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THE COURT: Good afternoon.

First of all, the record will be completed by the following: By letter of submission of December 8, 1982, DRBC sent in a copy of its Exhibit Number 15. That will be admitted.

By letter of submission of December 13, the plaintiffs submitted a copy of P-58, which is a memorandum dated May 28, 1981, Archaeologist, Office of Cultural Programs, NERC, HRS to Assistant Regional Director, Office of Cultural Program NERC, HRS Subject: Trip Report, Point Pleasant Water Diversion Project, Point Pleasant, Pennsylvania.

This document will be admitted.

Philadelphia Electric Company was given leave to file certain documents pertaining to proceedings before the NRC, in response to plaintiffs' submissions pertaining to NRC matters. Those submissions will be admitted as PECO exhibits, whatever the next PECO number is, according to the record.

MR. CHAMIN: If Your Honor please, that is Exhibit 4.

THE COURT: That will be admitted along with the certificate of service form which is attached thereto.

The hearing in this matter concluded Friday evening, the Court has reviewed the entire administrative record, all the exhibits introduced in this proceeding, the

1 various memoranda, responses, attachments thereto, legal
2 authorities cited, including statutes, regulations and
3 legislative history.

4 Counsel are to be commended for doing a fine
5 job in pulling together, in a short time, during and after
6 the conclusion of the proceeding, the evidence in the case
7 and focusing it in a manner helpful to the Court.

8 I have agreed to give a bench opinion because
9 both parties have asserted that by today, by virtue of the
10 actions proposed of the NWRA to commence construction, it
11 would suffer or begin to suffer irreparable harm. I devoted
12 my time to this point in reviewing the record and making my
13 decision and this opinion will constitute the opinion of the
14 Court with respect to the plaintiffs' motion for preliminary
15 injunction. The Court reserves the right to supplement,
16 amend or edit the same.

17 This action was commenced by plaintiffs
18 substantially as citizens action against various federal
19 agencies, the Pennsylvania Environment Resources Department,
20 DER, PECO, Philadelphia Electric Company, and NWRA, which is
21 the Meshaminy Water Resources Authority.

22 Individuals have also been named as defendants
23 in their individual and official capacities, where they are
24 the executive directors of the various defendant agencies.

25 The action is commenced against all defendants,

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1 it appears under the National Environmental Pol...y Act, the
2 National Historic Preservation Act, the Endangered Species
3 Act, the Delaware River Basin Compact, the Fish and Wildlife
4 Coordination Act, the substantive provisions of Section 110
5 of the River and Harbors Act of 1899 and Section 404 of the
6 Water Pollution Control and Federal Water Pollution Control
7 Act requirements for permits under Section 402 and for best
8 available technology under Section 316(b) and the Atomic
9 Safety and Licensing Act and regulations thereunder,
10 referring to page 2 of the complaint.

11 The plaintiff either orally or in the final
12 briefs in this matter has asserted that it intended to file
13 a claim under the Administrative Procedure Act, the plaintiff
14 does not assert a claim under the Administrative Procedure
15 Act. For purposes of this bench opinion, I shall assume that
16 the plaintiff has standing to assert and therefore is
17 entitled to amend the complaint to assert a claim under the
18 Administrative Procedure Act against the appropriate agency
19 defendants.

20 The complaint, while it names the Delaware
21 River Basin Commission as a defendant and its executive
22 director, in the caption fails to state a cause of action in
23 its body against the Delaware River Basin Commission.

24 The plaintiff was understood by the Court to
25 amend orally the complaint at the time of the hearing to

1 assert a claim against the DRBC, that its denial of the
2 Delaware petition for reconsideration was arbitrary and
3 capricious and therefore reviewable in this Court.

4 Various defendants have filed motions to
5 dismiss, either on jurisdictional grounds with respect to
6 certain allegations or with respect to failure to state a
7 claim upon which refusal can be granted.

8 With respect to the claims of the plaintiffs
9 asserted under the National Historic Preservation Act, the
10 Endangered Species Act, the Clean Water Act and the River
11 and Harbors Act, I find that this Court has no jurisdiction.
12 Those acts of Congress have specific provisions which limit
13 the right of citizens to bring suits in this Court. There are
14 notice and time provisions which are mandatory. There is no
15 implied cause of action under the River and Harbors Act, in
16 accordance with the decision of the United States Supreme
17 Court and using the same rationale, there is no implied cause
18 of action under either of the National Historic Preservation
19 Act and Endangered Species Act or Clean Water Act.

20 Congress has acted in these areas to
21 circumscribe the availability of the federal court to
22 plaintiffs unless and until certain statutory requirements
23 are met. Plaintiffs appear to concede as much in that they
24 argue in their beliefs that they would still have a right of
25 action under the Administrative Procedure Act, because either

1 there is final agency action or that there is action by the
2 agency which is so threatening of immediate and irreparable
3 harm that resort to the Court is necessary to enjoin agency
4 action.

5 With respect to plaintiffs' claims against
6 the NRC and Harold Denton in his individual and official
7 capacities, I find that this Court is without jurisdiction
8 and it would be an abuse of discretion to exercise jurisdiction
9 in the context of this complaint, even assuming that the
10 Susquehanna case is still good law in this circuit. First,
11 there is an ongoing administrative review of the PECO-Limerick
12 application within the domain of the Nuclear Regulatory
13 Commission. Plaintiffs, through Delaware are participating
14 in that administrative proceeding, which is not complete.
15 When completed, the plaintiffs, if agreed, will have a right
16 of appeal to the Third Circuit by statute.

17 Number two, the construction activity which is
18 the subject of this injunction action names MWRA as the
19 builder and constructor of the water system. NRC has no
20 jurisdiction to enjoin MWRA's construction. NRC will
21 determine when, if at all, the PECO water diversion to
22 Limerick I or II will be operational. That is not before
23 this Court.

24 Furthermore, the NRC has not refused to prepare
25 an environmental impact study. This situation is easily

1 distinguishable from the Susquehanna case cited by the
2 plaintiffs for the reasons just enumerated.

3 So, the claims asserted under the Atomic
4 Safety and Licensing Act, are hereby dismissed.

5 With respect to the claims against Roger
6 Baldwin, as an individual; Alexander Aldrich, as an individual;
7 William Gordon, as an individual and Gerald Mansler, as an
8 individual; I find that the plaintiffs' complaint fails to
9 state a cause of action and those actions will be dismissed
10 with prejudice for the following reasons. Although the
11 plaintiffs assert that Baldwin, Aldrich, Gordon and Mansler
12 are being sued in their individual capacities, a review of
13 the complaint discloses no action by those individuals which
14 amounts to individual actions, as opposed to action in their
15 official capacities.

16 Moreover, the relief sought by the plaintiffs
17 is against the agency. If plaintiffs are asserting a claim
18 under the Administrative Procedure Act, for example, the
19 proper claim is against the agency, not the individual.

20 Moreover, I would find from a review of the
21 record and the complaint, that each of the individuals is
22 entitled to qualified immunity. I might say, as well, that
23 the proceeding is not really as on motion to dismiss.
24 It's after hearing.

25 With respect to the Pennsylvania Department of

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1 Environmental Resources and Peter Duncan, I find that this
2 Court has no jurisdiction. The claims there asserted are
3 under the Clean Water Act. Again, there is a jurisdictional
4 requirement of notice.

5 Moreover, I doubt that this Court would have
6 jurisdiction in an APA claim against federal agencies, over
7 state agencies, with respect to their administrative agency
8 compliance. Further, the plaintiffs are pursuing in the
9 state administrative channels, challenges to the Pennsylvania
10 DER Acts with respect to various certificates or decisions
11 not to require permits of various kinds.

12 As a matter of comity, plaintiffs would be
13 required in this Court's estimation, to exhaust administrative
14 remedies in the state procedure and seek whatever relief is
15 appropriate there.

16 So, even assuming that this Court has
17 jurisdiction with respect to the Pennsylvania DER defendants,
18 it would not exercise that jurisdiction.

19 For those reasons, the complaint with respect
20 to Peter Duncan as secretary of the DER is dismissed. As a
21 footnote, I observe that there is no emergency situation
22 arising from the claimed inaction of the state official in
23 this instance. It is conceded that the Delaware River Water
24 will not in any way lower the standards of the water in the
25 Perkiomen Creek and that the best available technology is

1 being used for the intake at Point Pleasant.

2 Remaining, I find are claims asserted under the
3 National Environmental Policy Act and the Administrative
4 Procedure Act. Having studied all of the relevant material,
5 as well as that which might be irrelevant, but admitted and
6 reviewable, I have concluded that the plaintiffs' motion for
7 preliminary injunction will be denied under both the NEPA
8 and the APA against each of the remaining defendants.

9 First, with respect to the NEPA and the Corps
10 of Engineers. Plaintiffs complain that the Corps of Engineers
11 in rendering its environmental assessment and negative
12 declaration with respect to the Point Pleasant intake and
13 water diversion system, either acted unreasonably or
14 arbitrary and capriciously in failing to require or failing
15 to conduct an environmental impact study or statement.

16 The standard of reasonableness is a higher
17 standard of review than arbitrary and capricious, but I find
18 under either standard, the plaintiffs at this juncture on this
19 record have not shown under the standard applicable to
20 considering requests for preliminary injunction have
21 entitlement to that extraordinary relief. This Court is
22 limited under the reasonableness standard to a review of the
23 actions of the defendant agencies and cannot engage in its
24 own personal evaluation of the mental processes of the agency
25 administrators.

/xc

So, it's not a matter of record of what this Court would do if it were in the agency's position; it is what the record shows reasonably was considered, taking not only the findings but the administrative record as a whole and considering the administrative record as a whole, I find that with respect to a significant number of plaintiffs' claims, they are collaterally estopped because of the Hansler decision.

The plaintiffs have made out a prima facie case with respect to identifying certain changes since the Hansler decision, which would be of significant impact, if the plaintiffs' allegations were taken as true, but considering the defendant agency's evidence as this Court must at this stage, I find that the plaintiff has not shown by a preponderance of the evidence that there was either an abuse of discretion or a failure to give a hard look at, seriously consider, or give great weight to other agency opinion.

The plaintiffs here are collaterally estopped by the Hansler decision to the extent that the Hansler decision considered or was asked to consider and decided matters which are raised in this complaint. A study of the complaint in the Hansler case demonstrates that it was wide ranging and touched upon almost all the issues which are raised here as if they were new.

The plaintiffs are bound because they are in

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1 plicity with those plaintiffs who initiated the action before
2 Judge VanArtsdalen in this respect: That the plaintiffs there,
3 as the plaintiffs here represented the public interest and
4 their interests and injuries now rise no higher and are no
5 less than those asserted by the plaintiffs in Hansler for
6 the public interest.

7 Judge VanArtsdalen considered not the name of
8 the plaintiff but rather the issue, that is whether or not
9 certain actions or environmental effects were significant or
10 substantial so as to require of the DRBC the preparation of
11 an environmental impact statement as opposed to a final
12 environmental assessment. This Court incorporates all that
13 was decided and considered and therefore precluded here by
14 Judge VanArtsdalen in the Hansler case and as affirmed by the
15 Third Circuit.

16 What then is new?

17 1. Designation of the Army Corps of
18 Engineers as the lead agency in determining those matters,
19 environmentally, which were within its specific expertise:
20 navigation, construction in the river, and matters relating
21 to the construction as it would affect navigable waters.

22 2. A movement of the intake system away from
23 the shore bank and into the channel of the Delaware River.

24 3. A formal determination by the Advisory
25 Council on Historic Preservation that the village of Point

1 Pleasant was eligible for and was then placed on the historic
2 register.

3 4. An assertion that Shortnosed Sturgeon
4 had been seen in the area of Point Pleasant intake although
5 the report was unconfirmed.

6 A decision by the Corps of Engineers to
7 segment its consideration of the NWRA permits between Point
8 Pleasant and the Pine Run rechannelization.

9 A salinity study performed by the DRBC, a
10 ground water study done for and by the DRBC.

11 Next, the most current good faith negotiations
12 between those states who are parties to the DRBC.

13 Next, a statutory provision change, 110(f),
14 I believe, which the plaintiffs assert required the Corps to
15 take all possible steps to maximize non-impact on national
16 landmarks or historical sites. In the latter category,
17 assert that the authority had the obligation independently to
18 consider other intake sites than Point Pleasant, so as to
19 avoid the historical and archaeological sites altogether.

20 This Court is called upon, therefore, to
21 interpret that provision. In the findings of facts or the
22 statement of findings, the Corps made specific findings that
23 it had considered alternative routes around Point Pleasant
24 but these were unreasonable for the reasons stated therein.
25 Moreover, in accordance with 33 CFR 800, a memorandum of

1 agreement was entered into between the Corps, the Advisory
2 Council and the State Historical Preservation officer, with
3 respect to procedures to minimize the impact of the historic
4 district, the channel, and all other areas disrupted by the
kt 5 construction. The undertaking in the memorandum agreement
/kts is to have continued monitoring by the Advisory Council,
7 state office, the states, Historical Preservation officer
8 and the Corps to insure that all possible steps are taken to
9 minimize the impact to the historical district canal. Indeed,
10 as I read the agreement, no irreversible action can be taken
11 out and a determination that the action is an action which
12 meets their requirements of 33 CFR 800. The plaintiffs argue
13 that Section 110(f) required the Corps to look for other
14 intake sites along the Pennsylvania canal, other than Point
15 Pleasant, once the historic district has been certified.

16
17 The Corps took the position in its findings,
18 that it was bound in terms of its consideration of what was
19 possible by the determination of the DRBC as to the appropriate
20 point for water to be taken from the Delaware River.

21 In other words, it deferred to the DRBC with
22 respect to that judgment as to whether or not that point of
23 intake was most appropriate, given its other determinations
24 of river resources, basin resources and the needs for water
25 in Bucks and Montgomery Counties, as well as for PECO at
26 Limerick.

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4 I do not find that that deference was
5 unreasonable or arbitrary and capricious. There is a question
6 as to whether or not Section 110(f) applies to other than
7 federal or federally assisted projects. Assuming that it
8 does, it is not to be given the same scope of agency
9 determination requirement as was given and required by
10 statute in the Overton Park case. In that case, the statute
11 required that the agency make a determination that there was
12 no feasible or practical route for highway, other than
13 through a park and only after such determination was made,
14 could be administrator go on to determine what steps should
15 be taken to minimize the impact on the park area.

16 Here, the Congress decided to delete the
17 requirement for determination by the agency administrator as
18 to feasible or practical alternatives, leaving only that
19 section which required the administrator to determine what
20 steps would maximize or diminish the impact on the historic
21 district.

22 Considering the legislative history, I do not
23 find that there was a requirement on the Corps to make a
24 determination independently that there was some other place
25 than Point Pleasant for the intake, assuming 110(f) applied.
26 I find that the Corps did consider and gave great weight to
27 the determination by DRBC, that Point Pleasant was the proper
28 site for the intake to accomplish the water supply permits

1 which it had issued, pursuant to the entire history of the
2 Point Pleasant project, including those matters which were
3 before Judge VanArtsdalen.

4 To the extent that the Corps referenced and
5 included all of the proceedings by reference that had gone
6 before, I find on this record, that the Corps did consider
7 that history in determining the appropriateness to defer to
8 the DRBC decision to Point Pleasant as the intake location
9 and there is evidence in the record that the Corps did review
10 and consider all of the documentation pertaining to the Point
11 Pleasant project as considered by the DRBC and the AEC and
12 the NWRA. So, I do not find it reasonable to construe 110(f)
13 as requiring an administrator to do other than take all
14 possible steps open and available to it at that time to
15 minimize the impact on the historic district or canal. The
16 Corps considered all of the options open to it and on this
17 record, acted reasonably in arriving at a memorandum of
18 agreement.

19 Under the applicable regulations, there's a
20 presumption that the memorandum agreement satisfies the
21 obligation of the Advisory Council to advise. I believe the
22 language of the regulation is that the entering into a
23 memorandum of agreement satisfies the obligations of the
24 Advisory Council.

25 For that reason, I would find that as to the

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1 Advisory Council, that injunctive action is not appropriate
2 under the Administrative Procedure Act. The Advisory Council
3 has satisfied the requirements of the regulations. It has
4 not undertaken any final action with respect to any
5 irreversibly damaging action, with respect to the canal or
6 the historic district as certified.

7 I find that the record is sufficient for this
8 stage of the proceedings to satisfy me that the Corps studied
9 and considered the effect of moving the intake 245 feet into
10 the Delaware River as it effects or is considered in
11 conjunction with the black eddy, salinity, the effect on the
12 oyster industry and fisheries, dissolved oxygen, shad,
13 Shortnose Sturgeon, blasting effects, dredging, effects on
14 fish other than shad and Shortnose Sturgeon, flow velocity
15 at the intake, the effects of impingement and entrainment of
16 fish at the intake, the level of the top of the intake in
17 the river below the surface of the river at various flows,
18 the effect on navigation, recreation and safety to those
19 persons using the river at that point for fishing or other
20 forms of river recreation.

21 With respect to the salinity, I find that the
22 diversion of water could be said to have been reasonably found
23 by the Corps not to have any significant environmental impact.
24 Only 8 CFS of the diversion can be said to be subject to
25 consumption. As to that amount, there is no dispute that

1 that is not measureable by existing gages. Critically
2 important, it appears from the record, that to the
3 determination of the DRBC and the Corps, that the Point
4 Pleasant project would not have any adverse effect on the
5 salinity level being placed at Point Pleasant, is that with
6 the water returns, 50 percent of the water will be returned
7 to the Delaware River above or at the Schuylkill River mouth.

8 The Schuylkill River mouth is stated in the
9 literature in the record to be important as a stream flow to
10 the curtailment of the salinity level.

11 So, all the water taken out will be put back
12 in, at least that which is measureable. So, to the extent
13 the plaintiffs argue that the diversions will adversely
14 affect salinity, I find that that is not borne out by the
15 record. Moreover, it was considered and discussed by Judge
16 VanArtsdalen.

17 With respect to dissolved oxygen, I find from
18 this record, that there are studies available to the Corps
19 which were available to the Corps which showed that these
20 diversions or this diversion at Point Pleasant would have no
21 significant environmental impact.

22 Flows less than that which would be caused
23 by the diversions even at maximum diversion would not
24 significantly change the dissolved oxygen level at any point
25 along the river.

1 With respect to the flow velocity at the
2 intake level, I find that the evidence is, in this record,
3 satisfies the reasonableness and the arbitrary and capricious
4 test in that there were studies to show that given the
5 placement of the intake, the kind of intake, the placement
6 of the intake tubes close to one another and so forth, that
7 there would be no significant impact on fish.

8 The studies made were put on a worse case
9 basis, assuming that there was a spawning ground and the
10 Point Pleasant eddy, that shad would be there as well as
11 Shortnosed Sturgeon either spawning or moving past that
12 point.

13 The size of the intake screens are two
14 millimeters, that size was considered in relationship to the
15 larva of shad and sturgeon and other fish, although no tests
16 were made on shad per se, there were tests made on fish eggs
17 smaller in size than shad eggs, leading reasonably to the
18 conclusion that shad eggs would not be impinged.

19 Moreover, the swimming ability of shad was
20 considered. The flow velocity is calculated to be two to
21 one at the intake but the intake structure as presently
22 designed, in cooperation with the Pennsylvania Fish Commission
23 and the United States Fish and Wildlife Service is a state of
24 the art intake, which has very little impact upon early stages
25 of fish, even assuming less than 2-to-1 velocity flow at intake.

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1 The intake velocity diminishes dramatically as one moves one
2 foot from the intake.

3 There was a netting operation in the vicinity
4 of the intake for Shortnosed Sturgeon, which in 1981 disclosed
5 no sturgeon. No sturgeon had been caught in the immediate
6 vicinity of the intake.

7 The Shortnosed Sturgeon is an endangered
8 species, there was a determination by the U.S. Department of
9 Commerce that the Point Pleasant water diversion project would
10 not endanger species in the river; further made determinations
11 that the proposed operations would not constitute significant
12 environmental impact with respect to that endangered species.
13 It made a determination that its biological opinion was not
14 related to river flow, rather to what was known about the
15 Shortnosed Sturgeon and that is, that its eggs fall to the
16 river bottom, attach to rocks, or fall or find their way
17 under rocks, and hence, are not subject to intake velocity
18 considerations.

19 Moreover, there was a determination made but
20 there would be ongoing studies by the applicant, so that
21 monitoring would be made to insure that the project in no way
22 endangered Shortnosed Sturgeon.

23 As I said before, the intake is designed
24 anticipating the presence of Shortnosed Sturgeon, though there
25 is no evidence of Shortnosed Sturgeon in the area.

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1 On the basis of this record, I find there is
2 no basis for injunctive action with respect to the Department
3 of Commerce either under NEPA, under the APA.

4 Plaintiffs really have not offered anything to
5 refute the biological opinion rendered.

6 MR. LERNER: Excuse me, Your Honor, can we
7 take a brief recess?

8 THE COURT: You may.

9 With respect to esthetics, which would include
10 the height of any buildings, the noise of any transformers,
11 the replanting of any areas affected by the construction,
12 including the bluff, the evidence shows that there is a
13 memorandum of agreement to blend the underground piping and
14 buildings in the environment.

15 Apparently, plaintiffs complain that the bluff
16 outside of the certified historic district is not being
17 considered. However, I understand from this record that the
18 pipeline as to the bluff will be underground and covered.

19 There was the consideration of the archaeology
20 in the area. There is no evidence at that time that there is
21 any archaeology or aboriginal site in the direct line of the
22 water transmission lines. There is an archaeologist, who
23 as a condition of the permit is present at the site, supervising
24 both operations in or about the canal as well as those
25 pertaining to the esthetics. And, the Pennsylvania Historical

1 Preservation officer is there to approve any and all action.

2 Plaintiff claims the Corps acted arbitrarily and
3 capriciously or unreasonably in failing to consult or to
4 consult in good faith with the Fish and Wildlife Service which
5 opposed the Point Pleasant diversion. I find that Corps did
6 consult and did consider all of the positions advanced by the
7 Fish and Wildlife Service as well as the Pennsylvania Fish
8 Commission. Simply because the Fish and Wildlife Service had
9 a reluctance to agree with the Corps, that the permit issue,
10 it was the Corps' decision and not Fish and Wildlife's, with
11 respect to permit issuance. The Fish and Wildlife Service did
12 not elevate the matter as it had a right to do and its failure
13 to do so is evidence that it did not on appeal see any
14 significant environment impact.

15 Nothing new was raised by the Fish and Wildlife
16 Service that had not been considered by the Corps.

17 Plaintiffs argue that the Corps erred in not
18 considering that with respect to the permit application the
19 Pennsylvania Utility Commission had rejected PECO's
20 application there for a license to commence operation of
21 Limerick II. The record shows that reasonable it would have
22 been engineering-wise unsound to treat the application and
23 permit or construction as involving only water for Limerick
24 II. Limerick I had been authorized and encouraged by the
25 PUC. Moreover, NWRA, and independent water requirement and

1 BECO's possible withdrawal with respect to Limerick II, would
2 not have greatly enlarged the project of NWRA.

3 Plaintiffs argue that the Corps erred in
4 issuing its permit while NRC or other local state agencies
5 had not acted with respect to their permits which might be
6 required. I believe counsel conceded during the hearing,
7 that there is no statutory or regulatory requirement in that
8 regard.

9 Plaintiff's main argument is that the Corps
10 erred in segmenting the Point Pleasant project from the
11 Pine Run rechannelization.

12 There is a regulation which requires applicants
13 to submit applications for an entire project as opposed to
14 piecemeal submission, that regulation came into effect in
15 1982, two years after the applications had been filed by NWRA;
16 that regulation does not take away the discretion of the Corps
17 to determine that objectively there should be a division of
18 the project and here there is evidence that the rechannelization
19 though beneficial too, is not essential to the operation of
20 the water diversion system project. Therefore, even if there
21 is some environmental effects relative to the rechannelization,
22 it is not essential to the operation of the system. With
23 respect to the canal, itself, Pennsylvania authorities have
24 review the proposed construction and have determined that
25 the proposed construction under the canal will benefit the

1 canal. The Commonwealth of Pennsylvania owns the canal. The
2 kind of intrusions into the canal or under the canal, are not
3 uncommon along its route.

4 Now, with respect to the plaintiffs' claim that
5 the Corps did not consider a final level B study or a ground
6 water study done for the DRBC in making its determinations,
7 I find that again, it was reasonable for the Corps to defer
8 to the DRBC and this is consistent with the determination by
9 Judge VanArtsdalen in the Hansler case. The level B study
10 is not inconsistent with the management powers of the DRBC
11 to limit the withdrawals for PECO, if river flow is below
12 3000 CFS and to manage the withdrawal of the potable water
13 by NWRA in times of drought, nor is it inconsistent with the
14 declared management objectives of the DRBC at Montgomery-Bucks
15 County or other areas having ground water, develop a better
16 system for utilization of ground water in conjunction with
17 surface water.

18 With respect to the ground water study
19 completed in September of 1982, it does appear from the
20 report that the rechargeable rate for wells in the kind of
21 rock which is prevalent in these counties is very slow and
22 unpredictable.

23 With respect to plaintiffs' contentions that
24 PECO or NWRA could get their water from Philadelphia or other
25 places, including ground water wells, I find that the

1 plaintiffs' claim of arbitrary and unreasonable would fail
2 based on the Pennsylvania DER assessments and studies rejecting
3 that possibility as being unworkable, both water-wise and
4 in terms of its hope for industry or population growth
5 patterns to diminish the effect on consumption of water.
6 Plaintiffs argue, as well, that the Corps or DRBC did not
7 consider the Schuylkill River or upstream Schuylkill River
8 storage as an alternative to taking out of the Delaware River.
9 Again, the record shows that there was consideration by DRBC
10 and Pennsylvania DER of upstream storage possibilities, along
11 with PECO, as well as the availability of water at times
12 required by the Limerick operation from the Schuylkill and
13 those alternatives were rejected.

14 With respect to the Schuylkill in terms of
15 temperature of the water or low flows or adverse environmental
16 conditions which would arise from a diversion, now, I do not
17 find as a matter of law that the Corps was obligated to do
18 an independent study of every matter that might have been
19 raised by the plaintiffs. The Corps was entitled to review,
20 to consider the source of the liability, the measurements and
21 its own experience in evaluating information developed by
22 others, whether it was the NWRA or the DRBC or PECO. A
23 review of the administrative record shows that information
24 from these various sources was in the file available to the
25 Corps and encompassed in its findings. Perhaps not in detail,

1 but sufficiently so, as to persuade this Court that it would
2 be erroneous to conclude that the Corps acted unreasonably or
3 arbitrary and capriciously.

4 With respect to the DRBC, the plaintiffs' claims
5 against the Corps overlap, but to the extent that they do,
6 any discussion with respect to the DRBC will be equally
7 applicable to the Corps. With respect to the Corps, I find
8 that it's actions on the state of this record satisfy the
9 reasonableness test. Because the DRBC entertained and
10 specifically treated the plaintiffs' petition for reconsideration,
11 one could analogize that to affording the plaintiffs a hearing.

12 Therefore, the standard of review in that
13 instance would appear to be the arbitrary and capricious
14 standard as opposed to the reasonableness standard. The
15 arbitrary and capricious standard is usually accorded to a
16 reviewing agency in decisions where there has been an
17 administrative hearing. The reasonableness standard may be
18 more appropriate in reviewing agency action that was taken
19 not pursuant to a hearing or after a hearing or for
20 promulgation of a regulation. In reviewing the assumed
21 claim against the DRBC, I must assume that the claim is
22 being asserted under the Administrative Procedure Act or
23 under -- you tell me, Mr. Sugarman. Under what statute or
24 regulation are you proceeding as to the DRBC?

25 MR. SUGARMAN: It's under common law, Your

A 31

1 Honor.

2 MR. GOLDBERG: Your Honor, if I may, the U.S.
3 Administrative Procedure Act specifically of the DRBC's
4 compact is not applicable to it and that fact is so noted in
5 Judge VanArtsdalen's opinion. So, we are not governed by that
6 procedure specifically.

7 THE COURT: All right. I will look at the
8 claim against the DRBC in terms of whether or not the DRBC
9 acted reasonably or arbitrarily and capriciously, because I
10 am satisfied that under those tests, no matter how the
11 plaintiffs might be proceeding, injunctive relief is not
12 appropriate. Judge VanArtsdalen found, and I agree, that the
13 DRBC has particular expertise to which the Corps could defer
14 to the DRBC as lead agency to determine all locations of
15 water, the need for water and the management of the river.
16 The Delaware River is a managed flow river. All agree. The
17 DRBC has the exclusive responsibility for the management of
18 this river and water in the basin. The thrust of plaintiffs'
19 charges as to DRBC, is that given its analysis of river flows,
20 that the 3000 CFS objective at Trenton is unreasonable and
21 known to be a mirage by the DRBC for purposes of the Point
22 Pleasant project.

23 In short, plaintiffs argue that DRBC acknowledges
24 that there's not enough water in the river and that any
25 diversions without augmented flows from dams or reservoirs

A 32

1 to be constructed in the future, will be detrimental to
2 marine life, to the fishing industry and all of the objectives
3 with respect to salinity control, dissolved oxygen and the
4 like.

5 The plaintiffs' arguments on this record
6 overlook several important factors with respect to the level
7 B studies, the salinity studies and the good faith
8 negotiations. First, the level B study, that's not taking
9 into consideration in its analysis that there would be no
10 controls by PECO if the flows are below 3000 CFS in terms of
11 future projections, nor the management ability of DRBC with
12 respect to the withdrawal by NWRA in times of low flow, nor
13 is there plaintiffs' evidence or argument which considered
14 the fact that the level B report states, I believe, that
15 given existing storage capacities, there is still 110 CFS
16 available for allocation, nor does the plaintiffs' argument
17 take into consideration that the diversion at Point Pleasant
18 would result in consumptive loss of only 8 CFS. To equate
19 the effects of withdrawal of 95 MGD with a consumptive loss
20 of 95 MGD, is misleading.

21 DRBC has the responsibility to administer the
22 river flows to meet the permanent application requirements
23 and restrictions as well as one of the public needs served
24 by the river.

25 Mr. McCoy's presentation basically was a

1 challenge to DRBC or an attempted challenge to DRBC to fulfill
2 its commitments; that is through good faith. This Court is
3 not in a position from this record to place suspicion on the
4 the ability of DRBC to manage the river nor would it be
5 appropriate for this Court to in effect attempt the manage
6 the river for the DRBC. It's management abilities with
7 respect to PECO and NWRA would reasonably appear to give it
8 the manageability to control the withdrawal of those
9 applicants in accordance with the good faith negotiations
10 results, whatever they may be, which as I understand it from
11 the material reviewed will be to look at the drought of the
12 '60's as the drought of record as a plateau, the record
13 suggests that the drought of the '60's is recurrent on 100
14 to 300 years as opposed to the drought of the '30's, that
15 occurs maybe once every ten years.

16 Plaintiffs allege, among other things, that
17 the DRBC has already put into effect the recommendations
18 from the good faith on negotiations with respect to the
19 draw down of water from New York storage unit and hence,
20 argues the plaintiffs their must be a bad faith attempt
21 undertaking to ramrod into effect all the other recommendations,
22 including a relaxation of the salinity objectives.

23 The record shows, however, that the good faith
24 negotiation recommendations are subject to public hearing and
25 comment and that is an ongoing process, and hence, there is

1 no room for this Court to find, on this record, that there
2 has been a relaxation in fact of the salinity objective.

3 This Court is not the proper forum for an
4 attack on the proposed salinity level, if there is any change,
5 that should be done through the proper administrative procedures
6 available to plaintiffs or others through the DRBC.

7 I have reviewed that the plaintiffs' objections
8 raised to the DRBC and the responses to each. In light of
9 the record before the DRBC or that as considered by the DRBC
10 through its own contractors or supplied through studies
11 contracted for through the NWRA. I do not find any reason
12 to conclude that in denying the plaintiffs' petition for
13 reconsideration, the DRBC acted arbitrarily, capriciously or
14 unreasonably.

15 I could go through each of these in terms of
16 the objections and the responses on this record but I will
17 not.

18 I have studied the objections and I have
19 studied the responses and found in the record support for the
20 responses.

21 Based upon my independent findings and
22 discussion here, the Court adopts and incorporates in this
23 bench opinion the following proposed findings of facts as
24 prepared by NWRA, because they are consistent with the Court's
25 foregoing findings.

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1 The Court adopts 1 through 25; 27 through 40,
2 those are background historical as to which there should be
3 no objection.

4 41 through 65. 66 through 76. 77 through 82.
5 83 through 116. 117 through 134. 135 through 147. 148
6 through 150.

7 I find that those findings of facts are
8 supported by the record evidence available to the Corps and
9 the DRBC.

10 Plaintiffs final argument with respect to all
11 of the agency defendants and NWRA and PECO is that there was
12 a commitment to the Point Pleasant location such that the
13 Corps merely rubber stamped the desire of the NWRA and PECO
14 to use the Point Pleasant site because it was titled to
15 NWRA and that thereafter all of the efforts of the Corps
16 amounted to no more than going through the motions and was
17 not a good faith environmental assessment.

18 The plaintiffs suggest that the hiring or
19 the contracting of Miss Mints was designed to result in a
20 historical district whose boundaries would not include the
21 bluff or the esthetic charm of the village as opposed to
22 selecting the Bucks County Conservancy as advisor on the
23 historic certification because or whereas the later had a
24 broader sense of the boundaries of the historic district.

25 I find that the record shows that the Bucks

1 County Conservancy took the position that it was unavailable
2 as a contractor to complete the project within 30 days, Miss
3 Mintz was.

4 The plaintiffs argue that Miss Mintz did not
5 consult with the Bucks County Conservancy.

6 It is apparent from the record that the Bucks
7 County Conservancy did review and critique Mintz' report
8 evaluation. The Court submitted to the Advisory Council both
9 the Mintz report as well as the Bucks County Conservancy's
10 critique comments of the Advisory Council had both Mintz'
11 report and the Bucks County Conservancy's views as well as
12 the views of the State Historical Preservation officer in
13 determining the extent of the boundary of the historic
14 district.

15 Plaintiffs argue that Colonel Baldwin refused
16 to meet with representatives of Delaware on site. The
17 record does not support the view of Colonel Baldwin as one who
18 took the tact of avoiding contact with the public or with
19 the plaintiffs; the record does show meetings with counsel
20 of Delaware and Colonel Baldwin and Colonel Baldwin acting as
21 a moderator on a public hearing of the project.

22 I do not regard, based upon what I reviewed
23 in the record, the Corps' correspondence with the Fish and
24 Wildlife Service as being arbitrary and capricious.

25 The Wildlife Service did not specify the bases

A 37

1 of its objections to the project with any backup data. It's
2 speculative positions did not raise any concerns not already
3 addressed by the Corps.

4 Its request for information are puzzling, inasmuch
5 as it had as much access to the DRBC information as did the
6 Corps with respect to impact on biotics. Likewise, it had
7 access to the NWRA material. It did not conduct any independent
8 studies. The oxygen demand and segmentation appears to have
9 been a factor considered by the DRBC and the NWRA in the
10 dissolved oxygen studies in respect to the flows in the river.
11 I do not observe that the Fish and Wildlife Service took the
12 position in the case before Judge VanArtsdalen that the
13 project was bad, but did not raise any issue then which was
14 not considered and studied to Judge VanArtsdalen's satisfaction
15 by the Corps.

16 As Judge VanArtsdalen found there, just because
17 one agency has a difference of mind with the permitting
18 agency, is not a basis for saying that an environmental
19 impact statement is required. In considering whether or not
20 the plaintiffs have borne their burden of proving entitlement
21 to injunctive relief, the Court must consider whether or not
22 the plaintiffs will suffer irreparable harm if relief is not
23 granted, or whether the defendants will be harmed if relief
24 is granted, whether the public, generally, will be harmed if
25 relief is granted and whether the plaintiffs are likely to

1 prevail on the merits of the claim.

2 I have found that considering the evidence
3 before me, that the plaintiffs have not shown that they are
4 likely to prevail on the merits of the claim. I have
5 considered whether or not the construction in the Delaware
6 River or environs should be enjoined until such time as the
7 NRC acts or the Corps acts upon the rechannelization project
8 in terms of permitting or not. The PUC has determined
9 Limerick I's construction is in the best interest of the
10 public and it has directed that PECO complete that construc-
11 tion at the earliest possible time consistent with public
12 safety. The requirements placed upon the applicant NWRA by
13 the Pennsylvania DER is to complete all construction by the
14 end of 1984. The work in the river has to take place within
15 a specified time during any winter, reducing the period of
16 time that can be devoted to construction and with construction
17 with deliberateness, with a view towards public safety and
18 compliance with the minimization of loss of water in transport.
19 The DRBC has determined a need for water in Bucks and
20 Montgomery Counties, based upon the experience in 1980 and
21 1981 of water problems in those areas with wells running dry.

22 Balancing the harm that would occur to the
23 public if the project is not available mechanically for the
24 supply of water to Delaware and Montgomery Counties through
25 NWRA to supplement the well water and considering the harm to

1 the public if the Limerick I is not available for operation
2 on time because of the lack of completion of the mechanical
3 project, versus the harm to the river, to the canal, to the
4 environs, including the bluff, I find that on balance, the
5 public would suffer more harm if the project presently is
6 enjoined than if it continues. One, there is no harm to
7 the river presently if there is construction. Two, the work
8 under the canal will benefit the canal in terms of its
9 ultimate strength, according to the Pennsylvania Authorities.
10 Three, there is an architect available there and there are
11 procedures outlined for the photographing and replacement of
12 each aspect of the canal dirt or stones removed. The piping
13 is intended to be underground. The effect on the wetlands
14 will be minimal and of no significant impact and that really
15 has not been pressed as an issue here and the harm to the
16 bluff with blasting will be subject to the same conditions
17 as blasting in the district. The pipes will be underground
18 and covered. I agree with plaintiffs that if they have shown
19 that there was a significant environmental impact that has
20 been swept under the rug, then, that would be sufficient to
21 show irreparable harm.

22 Here, it is not enough to say, well, the NRC
23 has not acted and Limerick might not operate. There is an
24 independent applicant, NWRA, whose needs have independent
25 justification through the DRNC.

1 Are there any points any counsel believe now
2 the Court failed to consider in its opinion?

3 MR. SUGARMAN: I am not able at the moment to
4 think of any point which the Court has failed to consider.
5 I did note some concerns that I had with respect to some of
6 the Court's statements, interpretations and so forth.

7 I don't know if Your Honor means to encompass
8 that within your question.

9 THE COURT: Well, concerns you can argue later.
10 If I misstated some fact, you should bring it to my attention.

11 MR. SUGARMAN: Yes, that's what I really meant,
12 Your Honor.

13 If I may, the Court indicated that the Historic
14 Preservation Act has a provision for notice before suit was
15 filed and I don't have the statute with me, but I am not
16 familiar with any such provision. The same with respect to
17 the River and Harbors Acts. I am not familiar with any
18 provisions in either of those statutes for public notice.

19 With respect to the Clean Water Act, because
20 I didn't rely on it for a preliminary injunction, I didn't
21 put it in evidence, but we did in fact give notice to file
22 a citizen's suit action with respect to the DER actions under
23 the Clean Water Act. The one that we gave notice on was the
24 Department's determination not to require a permit for the
25 discharge into the Meshaminy North Branch. Your Honor stated

A 41

1 that we conceded that the water quality of the Delaware River
2 is such that it won't hurt the Perkiomen and we don't concede
3 that.

4 THE COURT: Well, it doesn't make any
5 difference. I have really not assumed jurisdiction over the
6 claim.

7 MR. SUGARMAN: I understand that. The same
8 with respect to best applicable technology with respect to
9 the intake. We concede, if you will, arguendo, that the
10 design is BAT, but we do not concede that the location is and
11 the statute relates to both location and design.

12 THE COURT: Well, all right, I did find here
13 that the location, considering the design, is not unreasonable.

14 MR. SUGARMAN: Your Honor, also in that area,
15 and maybe this maybe is an area of omission, did not refer to
16 the fact that the documents reflect that one of the considerations
17 in the location of the intake was to avoid crossing the state
18 line into New Jersey.

19 I don't know if Your Honor deliberately
20 decided -- that you did not intend to refer to that.

21 THE COURT: Well, I read that as a possible
22 concern, but what was important was that the design, plus
23 the location had objective support for the conclusion that
24 there would be no significant environmental impact. In fact,
25 largely because of the design, the location became less a

1 problem.

2 I will not get into the NRC materials, but I
3 am satisfied that it would be unfair to say that the location
4 of the pipe didn't go 255, because of New Jersey. I am
5 satisfied that the record shows it didn't go to 255 because
6 it was thought reasonable and sufficient to have it go to
7 245, considering the design of the intake and the location of
8 the intake pipes.

9 MR. SUGARMAN: Another matter that the Court
10 didn't refer to was the fact that the Corps refused to
11 secure or consider or to abide by and await the information
12 that was being developed in the preliminary hearings before
13 the NRC prior to issuing its permit, although we had informed
14 them of the intention of the NRC to hold those hearings and
15 they were otherwise aware of them. The Corps --

16 THE COURT: Well, I think I covered that by
17 saying there was no requirement on the Corps by the statute
18 of regulations to await the permit decision of any other
19 agency.

20 I might say there has been no record
21 determination that there has been a denial of a permit by any
22 permitting agency.

23 MR. SUGARMAN: I think there's some confusion
24 as to what happened with respect to the historic -- with
25 respect to the national historic landmark. It is our position

1 that Section 110(f) relates only to the national historic
2 landmark and not to the historic district and that it was not
3 the designation of the district that created the duty to
4 minimize harm, but rather the statutory amendment.
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A 44

1 THE COURT: With respect to the canal?

2 MR. SUGARMAN: Yes, sir. Well, the statutory
3 amendment was general with respect to all landmarks
4 and it, of course, referred specifically to the, as we say,
5 I don't think there is any dispute about it.

6 MS. SIEGEL: The canal is the only landmark.

7 MR. SUGARMAN: The statute refers only to
8 landmarks.

9 THE COURT: I understand that. I gave you
10 the benefit of the doubt, I suppose, since the canal had
11 not been crossed at any point of taking from the Delaware.

12 I thought you had argued here that this
13 particular point of the canal --

14 MR. SUGARMAN: Yes, sir.

15 THE COURT: -- was so pretty but it's the
16 canal which is the historic landmark.

17 MR. SUGARMAN: That is right, sir.

18 THE COURT: I assumed that you were arguing
19 the duty really applied to the district so, I think I treated
20 it.

21 MR. SUGARMAN: The point I was getting to,
22 your Honor, is that the Corps, your Honor, says that the
23 Corps was entitled to rely on the DRBC. I am not sure if
24 your Honor meant in that way to dispose of our argument that
25 A, the DRBC specifically deferred on the issue of historic

A 45

1 compliance to the Corps, and, if your Honor want to say
2 that in those circumstances the Corps was still entitled
3 to rely on the DRBC determination as to interpret the DRBC
4 determination as requiring or as determining where on the
5 Delaware River the water should be drawn and then relying
6 on that, even though a statute had been passed and if that is
7 the case then --

8 THE COURT: I don't understand what you
9 are saying.

10 The Corps, I found had a right to rely upon
11 the DRBC in determining by its Section 3.8 approval that
12 Point Pleasant was the place for the intake of water to
13 facilitate the delivery of water to Bucks and Montgomery
14 Counties and the Corps had a right to find reasonably that
15 that determination was conclusive.

16 Actually it was probably conclusive in that
17 there had been a long study of that project, even through a
18 final environmental impact statement, reviewed by the
19 Third Circuit with respect to the location and the location
20 considering that the historic landmark would have to be
21 crossed. And that there are archaeological sites and that
22 indian relics possible in the area and that practical steps
23 should be taken to minimize the harm to the canal, to the
24 historic site, including the village district.

25 MR. SUGARMAN: The only point I am making,

A 46

1 your Honor, the DRBC made all of those decisions without
2 taking into account, without complying with the National
3 Historic Policy Act, the National Historic Preservation Act,
4 the DRBC passed all of those issues to the Corps of Engineers,
5 so, what the Court is in effect holding, therefore and I
6 just wanted, I guess to clarify that your Honor is aware that
7 the Court is in effect holding that the DRBC could make a
8 final decision on compliance with Section 110 which determined
9 compliance with Section 110(f) while at the same time passing
10 that responsibility to the Corps of Engineers.

11 THE COURT: I didn't say that. I don't agree
12 with you that 110(f) requires that there be a determination
13 by either the Corps or by the DRBC of feasible and practical
14 alternate routes as in placement of highways through parks.

15 The obligation is, once a historic landmark
16 is confronted, that all steps be taken to minimize the
17 harm and the Corps found that the canal had to be crossed.

18 MR. SUGARMAN: But, your Honor, what we
19 are talking about then is --

20 THE COURT: As well as the DRBC. The issue
21 then was how to minimize the harm to the landmark.

22 MR. SUGARMAN: What we are talking about is
23 assuming that the landmark has to be crossed, the selection
24 of the location to cross the landmark that would minimize
25 harm.

1 THE COURT: To what, the canal?

2 MR. SUGARMAN: To the canal, right.

3 THE COURT: Well, the canal is important
4 wherever it goes.

5 MR. SUGARMAN: The harm might be less at
6 different locations.

7 THE COURT: I will say this. At this point
8 on this record, this is a preliminary injunction hearing,
9 not a final hearing, I have determined that considering
10 your concern as raised, the presumption of regularity according
11 to the agencies is sufficient to meet that.

12 MR. SUGARMAN: To meet what, your Honor?

13 THE COURT: Your concern, you have raised a
14 concern that there might be a better place along the canal
15 for it, there is no evidence that there is.

16 MR. SUGARMAN: Your Honor, there was evidence
17 before the Corps that there would be other locations that
18 would be better. There was evidence in the sense that the
19 -- there was evidence that the point was made to the Corps.

20 THE COURT: The issue is not just the impact
21 on the canal but the impact on the delivery system of water,
22 you know, it might be, you might go 57 miles north and come
23 back, but you still have to consider what it means in terms
24 of laying pipe and so forth along 57 miles to get to the
25 particular reservoir. As it turns out going this route is

A 48

1 Only three-tenths of a mile.

2 MR. SUGARMAN: We are not arguing, your
3 Honor, that the --

4 THE COURT: 2.3 miles, whatever it is.

5 MR. SUGARMAN: We are not arguing that the
6 consideration of minimizing impact to the landmark is the
7 only consideration that the agency is allowed to take into
8 account.

9 We recognize that there can be other con-
10 siderations under that statute and as your Honor indicated,
11 that your Honor is interpreting the statute.

12 What we are saying, there is no evidence that
13 any other locations along the route were ever considered in
14 order to determine whether they would minimize harm to the
15 landmark and whether they would be otherwise acceptable.
16 There is no -- and, your Honor, I just want to make sure that
17 your Honor was intending to hold that didn't have to be done,
18 which is what I understood your Honor to say.

19 THE COURT: I am holding there does not have
20 to be a determination in the findings that there was some
21 other feasible or practical route; that once the historical
22 landmark is confronted, the agency must consider all
23 possible means of minimizing the harm to the landmark.

24 MR. SUGARMAN: Does that include other
25 locations, other ways to cross the canal, other places along

A 49

1 the 57 miles?

2 THE COURT: It could, but in my opinion
3 it doesn't have to.

4 MR. SUGARMAN: And, your Honor, further holding
5 that the Corps can rely on the DRBC on that point, even though
6 the DRBC did not take into account minimizing harm to the
7 landmark under that statute?

8 THE COURT: I will find that the DRBC did
9 take into consideration minimization of harm to the canal
10 at that point, even before there was a deferral to the
11 Corps.

12 There is record evidence showing there were
13 plans minimizing the harm and determination and findings
14 that no significant harm would occur to the canal from the
15 procedures proposed by NWRA were carried out.

16 So, I cannot say that the DRBC deferred.

17 Moreover, Section 111(f) was not in effect.

18 MR. SUGARMAN: Exactly.

19 THE COURT: But, nevertheless, I am satisfied
20 in this record that the DRBC treated the canal as a historic
21 landmark.

22 I am also satisfied on the record that the
23 DRBC choice of location was entitled to great deference for
24 the intake, considering the plan for the overall project.
25 For example, the plan for the water to reenter the Parklomen

A 50

1 Creek, so as to enter into the Delaware River at important
2 points for control of salinity.

3 So, that's what I meant by saying there is a
4 presumption of regularity with respect to DRBC's consideration
5 of the point of location of the intake.

6 There's also the consideration of where
7 Shortnosed Sturgeon are located in the river.

8 MR. SUGARMAN: By the DRBC, your Honor?

9 THE COURT: No, I am just saying generally.

10 I mean, the Corps was aware that Shortnosed
11 Sturgeon had been caught ten miles up river and when I say
12 to you that environmentally and need-wise, the DRBC determina-
13 tion of intake is entitled to great deference, such that
14 the Corps was entitled to conclude that the intake had to be
15 in the Point Pleasant area and was not at liberty to in
16 effect assume the role of DRBC in determining the water
17 intake location.

18 MR. SUGARMAN: Is your Honor then making
19 any holding concerning the responsibility of DRBC to review
20 its prior determination in the light of the statutory change?

21 THE COURT: The DRBC deferred to the Corps
22 to make sure that it complied, the Corps complied, to be the
23 lead agency on historical landmark impact minimization and
24 I am finding that based upon the Corps' determination of
25 minimization, there was no need for the DRBC to reconsider

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51

1 its grant.

2 MR. SUGARMAN: Thank you, your Honor. That
3 clarifies it.

4 With respect to the bluff, your Honor, I
5 believe --

6 THE COURT: I got a lot of bluffs out of
7 your brief, that's why I referred to the brief, I mean the
8 bluff, I am not saying that you are bluffing, but you made
9 a big point in your brief that the bluff is somehow outside
10 of the district and is going to be harmed.

11 MR. SUGARMAN: Yes, sir.

12 Well, yes and no. We did talk a lot about
13 the bluff or a fair amount about it, but I believe we
14 said in our brief and incidentally that the record shows that
15 the bluff is in the historic district, and not outside of it.

16 THE COURT: Outside or inside, the Memorandum
17 of Agreement accords it the same protection as it was inside.

18 MR. SUGARMAN: Sir, I think I explained and
19 I offered testimony to the Court, to have Miss Auerbach
20 to back me up, that I was present at a meeting and she was
21 present at a meeting where the Corps of Engineers specifically
22 they would not consider the bluff, would not define the
23 project as including the bluff and would not address them-
24 selves to any impact on the bluff and they would not and did
25 not.

A 52

1 THE COURT: My reading of the agreement is
2 that the bluff is to be accorded protection as though it
3 were in the district, is consistent with the representations
4 of PECO and NWRA and the Corps here at this hearing and that
5 is, that the pipes will be underground and covered and subject
6 to the review of the powers that be to that agreement to make
7 sure there is conformity with the aesthetic objections and
8 landscaping objectives to blend as much as possible into the
9 existing environment.

10 MR. SUGARMAN: Well, I think, your Honor, I
11 needn't belabor the point, since your Honor has made his
12 determination on it.

13 I just wanted to call the Court's attention
14 to that specific fact, on that point, that the historic
15 district, I believe does include the bluff, and that the
16 Corps in its documents, to my understanding of those
17 documents, did not afford any protection to the areas across
18 River Road, which means, including the bluff. They defined
19 their area of jurisdiction as running only to River Road.

20 THE COURT: Well, the Memorandum of Agreement
21 though places the Advisory Council in a position, as well
22 as the State Historical Preservation Officer, in a position
23 to review all of the construction impacts affecting the
24 district, as well as the canal.

25 MR. SUGARMAN: I think, your Honor, that the

1 agreement and other counsel, I don't have the agreement with
2 me, and I haven't looked at it -- I have looked at it from
3 that point of view, but I don't want to say, in response to
4 the Court's expression --

5 THE COURT: Again, I have given you what
6 appears to be a reasonable interpretation.

7 MR. SUGARMAN: Right.

8 THE COURT: Based upon my reading and the
9 representation of the applicants and the permitting party.

10 MR. SUGARMAN: As I say, there is no reason
11 in belaboring the point.

12 THE COURT: Further, there is no agency
13 determination with respect to the Advisory Council and it has
14 not failed to act or failed to carry out some non-discretionary
15 function and, so, it seems to me, that it may be appropriate,
16 if in effect the pipes are put above ground, or not covered,
17 to complain, but right now, it seems to me that no one is
18 taking the position that you are taking except you.

19 MR. SUGARMAN: Well, your Honor, we take the
20 position that having -- the scaring of that bluff, by clearing
21 it and keeping it cleared, and blasting through the bluff,
22 to put -- they will never be able to restore the rock base, and
23 they will not revegetate it the way it is, and it will not
24 be a natural rock face, as it is now, and that will occur
25 inevitably as a result of the construction, and we have taken

1 that position all along and I agree with you. And, it is
2 true that the other agencies haven't -- were not and it's
3 true, that the agencies have not taken the position that we
4 have, and that's why we are here.

5 Well, the only other point I would make, in
6 response to your Honor's question is that I am not sure as
7 I listen to your Honor, whether you are aware that the DER
8 assessment is under appeal as part of the permit appeals that
9 we have filed with the state.

10 THE COURT: I am.

11 MR. SUGARMAN: I wasn't sure about that.

12 THE COURT: That's why you shouldn't be here
13 on that claim.

14 MR. SUGARMAN: Well, your Honor, we are only
15 trying to maintain the status quo until these things can be
16 resolved and we did not select the dates for these things to
17 happen, and the NWRA and PECO could have applied for the
18 permits a long time ago and by doing it in the way that they
19 did, the permits came out after they had already advertised
20 for bids in the case of the Corps permit, the DER permits came
21 out just about the date that they went to bid, by waiting
22 that long, and by shortening the time that we could obtain
23 final adjudications, they have put us and the Court in this
24 short time frame situation. So, to say we shouldn't be here,
25 your Honor when --

THE COURT: That's an operational consequence,
and the facility is not operating, I mean, so you have plenty
of time to have review before the --

/kt
1 MR. SUGARMAN: That is correct, Your Honor,
2 and the only problem is that some of the harms due in our
3 view result from the inception of construction and we also
4 are concerned that it would be too late to have an open-minded
5 reassessment once construction is far advanced and they
6 certainly --

7 THE COURT: Open-minded by whom?

8 MR. SUGARMAN: By the agencies involved.

9 THE COURT: Well, the harm that the
10 environment faces presently is a disruption of the canal,
11 the filling in of some areas and scarring for purposes of
12 constructing, but even the construction plans are being held
13 in terms of adverse impact to a minimum.

14 MR. SUGARMAN: Your Honor, that's their
15 contention.

16 THE COURT: Well, the permit, for example, has
17 a requirement that the dredging equipment be barged. So,
18 I agree with you that there is a risk to the environment that
19 there will be some temporary scarring and some of which may
20 not be put back in perfect order, but on balance, the risk
21 of harm to the environment where there is no significant --
22 no projection of significant, permanent disfigurement to the
23 canal or to the surrounding environment or to the esthetics
24 of the area, do not outweigh the risk of great public
25 inconvenience if by virtue of delay, the project is not

ready for operation to supply water to various sources.

MR. SUGARMAN: On that point, Your Honor, there is no evidence in the record of any date of inception of NWRA service, that is, public water supply service and there is no -- and the PECO witness on irreparable harm admitted that PECO has not even looked at alternative water supply sources that would enable them to operate Limerick unit one.

THE COURT: My understanding is that the water need in Bucks and Montgomery Counties is ASP and that while there has been no sale of water by contract, no water can be sold until other permits are obtained by the NWRA.

MR. SUGARMAN: My point, Your Honor, is that they have not -- the record is silent as to when they can -- when they can institute service and -- but the record does not show that they need a water treatment plant in order to do that.

THE COURT: Well, that may be so, but still --

MR. SUGARMAN: What I am saying, Your Honor --

THE COURT: In terms of balancing the harm to the environment, based upon the record, versus the risk of harm to the completed objectives of the DRBC in terms of supplying adequate water to the basin, I find that injunctive relief is not appropriate.

MR. SUGARMAN: My point, Your Honor, on that,

1 and I think it goes to the -- the DRBC desired to provide
2 water to Bucks and Montgomery Counties. That's not controlled
3 by the approval of this project. It's controlled as well
4 independently by NWRA's ability to complete and get permitted
5 and get into operation and water treatment plant and Your
6 Honor may recall that NWRA provided no testimony that
7 indicated in any way that it would be able to institute
8 service upon completion of this project or put the other way,
9 that any delay in the construction in Point Pleasant would
10 delay them in instituting public water supply service. They
11 provided no testimony to that effect, whatsoever.

12 THE COURT: I am satisfied on the record that
13 I have balanced the equities.

14 I considered the PECO equities and the monetary
15 loss there as projected is credible in terms of delay costs.

16 MR. SUGARMAN: But, they provided no evidence
17 that they could not get water from another source.

18 THE COURT: I am satisfied that given the
19 state of the record that the irreparable harm issue has to be
20 measured from what the expectation of PECO is and that is for
21 the completion of this project by the particular date and we
22 are not in any NEPA considerations, but rather, in irreparable
23 harm considerations and those are measured by what the
24 applicant has reason to expect, given the permits that have
25 been issued.

1 Do you have anything else?

2 MR. SUGARMAN: No, sir; only -- may I get
3 clarification on Your Honor's disposition of the -- of our
4 claims against the agencies? For example, under the River and
5 Harbors Act, joined with the Administrative Procedure Act,
6 Your Honor's indication that the Court has no jurisdiction,
7 was that intended to relate to our claims against the Corps
8 of Engineers for issuing the permit in which we say that they
9 acted arbitrarily and capriciously in violation of the River
10 and Harbors Acts under the standards of the APA?

11 Is the Court meaning --

12 THE COURT: There's no implied right of action.

13 MR. SUGARMAN: We agree there's no implied
14 right of action.

15 THE COURT: That's what I intended to say.

16 MR. SUGARMAN: Insofar as they come in under
17 the APA, Your Honor is saying there is a cause of action?

18 THE COURT: Yes, and with respect to that, I
19 do not see that you made out a prima facie case of violation
20 of procedure by the Corps with respect to the Harbors Act.
21 You are really claiming that the Pennsylvania authorities
22 didn't get the right permits.

23 MR. SUGARMAN: Pennsylvania authorities?

24 THE COURT: What do you claim the Corps didn't
25 do with respect to Section 10?

A 60

1 MR. SUGARMAN: They didn't give great views
2 to the Fish and Wildlife Service as required by their
3 regulations.

4 THE COURT: I found that they did.

5 MR. SUGARMAN: I meant in terms of a cause of
6 action.

7 THE COURT: That's satisfies that. What other
8 agency claim are you concerned about -- substantive claim,
9 APA claim?

10 MR. SUGARMAN: Each of the federal agencies,
11 the Historic -- the Advisory Council --

12 THE COURT: With respect to the Advisory Council,
13 I found they entered an MOA and that satisfied that advice
14 obligation under the regulations and under case law.

15 Further, there is no filed action by the
16 Advisory Council. They have an ongoing administrative monitoring
17 role. With respect to the National Marine Fishery Service,
18 I found that they did take final action, to be sure, they
19 found there would be no endangerment of the species in the
20 river and no basis to say that the decision was arbitrary
21 and capricious and moreover, there's continuing monitoring
22 action by the agency. It has not abandoned and taken final
23 action and say they will just write it off.

24 MR. SUGARMAN: One other question.

25 Under the archaeological work that was

A 61

continuing and Your Honor was informed of last week and the week before, the on-site work has concluded. I am informed that the archaeologists under contract to the NWRA have given their -- it is their opinion that there is no need to hold up construction because of the archaeology, although, they found some significant archaeological material. They found there is a remains of an Indian house which is a rare find, but all that's going to be reported --

THE COURT: Just a minute. I do not want you to think that you are testifying.

MR. SUGARMAN: No.

THE COURT: If you have something that you want the Court to consider, you should submit it by way of evidence or affidavit in a final hearing.

MR. SUGARMAN: What I was going to ask Your Honor is, you indicated you would entertain a motion when the archaeological findings were complete and the findings have been made by the respective agencies, the state office and the federal office. I just wanted to clarify that that is still the case and that issue as Your Honor, I think said, was not ripe at the time we brought it out on this motion. I don't know if we would want to be filing a motion.

THE COURT: What I said just about an hour ago -- if you want to file an amended document or another claim, that is your right, but based upon this record, based

1 upon these contentions, I have made my findings and conclusions.

2 MR. SUGARMAN: I just wanted to clarify that.

3 Thank you.

4 THE COURT: I recognize, certainly, that each
5 of the agencies has undertaken by virtue of the limitations
6 on their permits or the memoranda agreements, enforceable
7 undertakings and they can't act arbitrarily and capriciously
8 with respect to the decisions on those agreements, but right
9 now, until there is an assertion in a proper way, that there
10 is an improper action, what has been done, satisfies the
11 requirements of agency action.

12 MR. SUGARMAN: Thank you very much, sir.

13 MR. GOLDBERG: Your Honor, just one brief
14 comment. Your Honor indicated that you were reserving the
15 right to amend or extend your marks and in addition, that
16 apparently, there will be some further proceedings before
17 there is a final determination on the merits of this suit
18 and you asked counsel about whether there were any factual
19 materials or corrections to be made. I took notes, but I am
20 not in a position to suggest to the Court any corrections or
21 changes at this point, but after the transcript is available,
22 if it appears that there are any factual points for the
23 assistance of the Court that we could call to your attention,
24 we would like to feel free to do that, so that can be
25 incorporated into any final statement of the Court on this

A 63

master..

THE COURT: Anything that you find to be significant, you should bring it to my attention now. I will certainly correct anything that is obvious, whether it is legal or factual, because I do not know the intent of any party here.

There is a right of appeal from my decision and I do not want to take the position that while I am not enjoining construction, for example, the plaintiffs have to wait until I have entered a final order before considering appellate review. If you do have something in terms -- if you feel I have made a misstatement of the law, straighten me out my tomorrow and I will incorporate it and so there will be a final order, but I am satisfied that however the Court of Appeals looks at it, if it looks at it under whatever theory, it has to look at the factual review of the evidence submitted and the standard of review applied.

All right, anything else?

(No response.)

THE COURT: Thank you.

(Whereupon, Court was adjourned at 6:20 p.m.)

A 64

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., et al. : CIVIL ACTION
v. :
ROGER M. BALDWIN, et al. : NO. 82-5115

FILED DEC 23 1982

BENCH OPINION CORRECTION SHEET

AND NOW, this 23rd day of December, 1982, it is hereby ORDERED that the following correction sheet shall be incorporated into the court's bench opinion rendered in this matter on December 15, 1982.

1. P. 1438, line 4 - change "Section 110" to "Section 10".
2. P. 1439, line 7 - change "refusal" to "relief".
3. P. 1439, lines 9-11 - delete "the National Historic Preservation Act," and "and the River and Harbors Act,". Insert "and" after "Act" on line 10.
4. P. 1439, line 15 - after "Harbors Act," add "see California v. Sierra Club, 451 U.S. 287 (1981), and,".
5. P. 1439, line 17 - after "Court" add "in Middlesex City Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1. (1981),".
6. P. 1439, line 24 - change "beliefs" to "briefs".

ENTERED: 12-28-82

CLERK OF COURT A-65

7. P. 1440, line 10 - after "case" add "619 F.2d 231 (3d Cir. 1980), cert. denied, 449 U.S. 1096 (1981),".
8. P. 1440, line 15 - change "agreed" to "aggrieved".
9. P. 1440, line 25 - change "study." to "statement."
10. P. 1443, line 20 - delete "have".
11. P. 1443, line 22 - change "the reasonableness" to "either".
12. P. 1444, line 1 - delete "a matter of record of".
13. P. 1444, line 8 - after "decision," add, 536 F. Supp. 26 (E.D. Pa. 1981), aff'd, 681 F.2d 805 (3d Cir. 1982)."
14. P. 1445, line 24-25 - change "Advisory Council on Historic Preservation" to "Keeper of the National Registry".
15. P. 1446, line 1 - add after "was", "determined to be."
16. P. 1446, line 9 - substitute "Corps," for "DRBC,".
17. P. 1446, line 13 - after "110(f)," add "of the National Historic Preservation Act,".

18. P. 1446, delete lines 15-16 - add "undertake to the maximum extent possible, such planning and actions as may be necessary to minimize the harm to national landmarks."

19. P. 1446, line 17 - delete "assert".

20. P. 1447, line 4 - change "channel," to "canal,".

21. P. 1447, line 11 - change "out" to "without".

22. P. 1447, line 24 - add "water" before "for".

23. P. 1448, line 7 - after "case," add "401 U.S. 402 (1971)."

24. P. 1448, line 11 - change "be" to "the".

25. P. 1448, delete line 17-18 and substitute "steps would minimize the harm to the historic landmark."

26. P. 1449, line 7 - change "appropriateness" to "appropriateness".

27. P. 1450, line 25 - add after "consumption," "assuming that the River flow is less than 3000 cfs."

28. P. 1451, line 1 - change "gages." to "gauges."

29. P. 1451, line 2 - delete "that".

30. P. 1451, line 7 - delete "or at" and "mouth".

Add after "above", "Philadelphia and 50 percent through".

31. P. 1451, line 18 - delete "available to the Corps."

32. P. 1452, line 2 - delete "is"; line 13, substitute "is" for "are".

33. P. 1452, lines 14 and 15 - end sentences with "millimeters." and "fish."

34. P. 1453, line 8 - end sentence with "species."

35. P. 1453, line 9 - after "Commerce" add "(National Marine Fisheries Service)".

36. P. 1453, line 10 - substitute line 10 with "not endanger the species in the river. Further, it made a determination".

37. P. 1453, line 11 - add "a" after "constitute".

38. P. 1453, line 14 - end sentence with "flow."
Substitutue "to what" with "it was based on what".

39. P. 1455, line 21 - change "reasonable" to "reasonably".

41. P. 1455, line 22 - reverse order of words "engineering-wise", and "unsound".

42. P. 1455, line 25 - after "NWRA" substitute "has an" for "and".

43. P. 1456, line 14 - end sentence with "submission".

44. P. 1456, line 19 - delete "too".

45. P. 1456, line 24 - change "review" to "reviewed".

46. P. 1457, line 14 - change "at" to "that".

47. P. 1458, line 8 - add "water" after "taking".

48. P. 1458, line 12 - delete "and"; place period after "Schuykill"; line 13 - start next sentence "Those . . ." and connect with sentence in line 14, stopping at "diversion" on line 16; start next sentence "Now," line 16; p. 1458, line 20 - substitute "and the reliability of" for "of the liability,".

49. P. 1461, line 8 - end sentence after "study" and substitute "that's not taking" with "They do not take".

50. P. 1461, line 9 - substitute "in its" with "DRBC's".

51. P. 1461, line 10 - change "controls" to "withdrawals".

52. P. 1461, lines 12 and 16 - end sentences with "flow." and "allocation." respectively.

53. P. 1461, line 18 - add after "CFS," "assuming that the River flow is less than 3000 cfs."

54. P. 1462, line 12 - end sentence with "plateau."

55. P. 1462, line 18 - delete "on".

56. P. 1462, line 20 - change "their" to "there" and add "or" after "attempt".

57. P. 1464, line 23 - change "later" to "latter."

58. P. 1466, line 11 - delete "do not".

59. P. 1466, line 22 - change "suffere" to "suffer".

60. P. 1472, line 11 - delete "not been" and sub-
stitute "to be".

61. P. 1477, line 14 - delete "from" and substitute
"if". Line 17, change "Section 111(f)" to "Section 110(f)".

62. P. 1479, line 21 - add "stated" after "specif-
ically".

63. P. 1481, line 20 - change "scaring" to "scar-
ring".

64. P. 1482, line 22 - change "log," to "long,".

65. P. 1487, line 7 - change "That's" to "That".

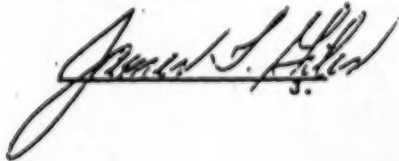
66. P. 1487, line 13 - change "filed" to "final".

67. P. 1488, line 7 - change "fine," to "find,".

68. P. 1490, line 13 - change "my" to "by".

The standard of review, scope of hearing and evidentiary rulings made during the course of the preliminary hearing, are incorporated herein by reference. The administrative record of the Corps, all of which was reviewed, is hereby marked and made "Court Exhibit 1."

BY THE COURT:

A handwritten signature in dark ink, appearing to read "James S. Miller". The signature is written in a cursive style with a large, sweeping initial "J".

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RECEIVED
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SUGARMAN AND BERNHART

DEL-AWARE UNLIMITED, INC., et al.,

Plaintiffs

v.

Dkt. No. 82-5113

ROGER M. BALDWIN, et al.,

Defendants

NESHAMINY WATER RESOURCES AUTHORITY'S
PROPOSED FINDINGS OF FACT

Of Counsel:

COHEN, SHAPIRO, POLISHER,
SHIEKMAN AND COHEN
12 South 12th Street
Philadelphia, PA 19107

WILLIAM J. CARLIN
ALAN M. LERNER
HERSHEL J. RICHMAN
DAVID J. BROOMAN
ANN A. NEVEL

BEGLEY, CARLIN & MANDIO
120 Mill Street
Bristol, PA 19007

TABLE OF CONTENTS

	<u>Page</u>
I. HISTORY OF PRIOR ACTIONS, ENVIRONMENTAL REVIEWS AND APPROVALS	1
II. THERE HAVE BEEN NO SIGNIFICANT CHANGES IN THE POINT PLEASANT PROJECT OR SURROUNDING ENVIRONMENTAL CIRCUMSTANCES SINCE JUDGE VANARTSDALEN'S DECISION IN <u>DELAWARE I</u>	12
A. <u>There Will Be No Adverse Impact on Fish and Aquatic Biota from the Change in the Location of the Intake Structure.</u>	12
B. <u>No Significant Impact Will be Caused on the Dissolved Oxygen Levels or on the Salinity Levels in the Delaware River as a Result of the Withdrawals at Point Pleasant.</u>	17
C. <u>Groundwater is Not a Viable or Feasible Alternative to Surface Water Supply.</u>	20
III. THE U.S. ARMY CORPS OF ENGINEERS FULLY COMPLIED WITH THE MANDATES OF SECTIONS 104 and 110(f) OF THE NATIONAL HISTORIC PRESERVATION ACT	22
IV. THE U.S. ARMY CORPS OF ENGINEERS CONSULTED WITH THE FISH AND WILDLIFE SERVICE IN ACCORDANCE WITH THE SUBSTANTIVE PROVISIONS OF THE FISH AND WILDLIFE COORDINATION ACT.	29
V. THE BIOLOGICAL OPINION OF THE NATIONAL MARINE FISHERIES SERVICE, DETERMINING NO SIGNIFICANT ADVERSE IMPACT ON THE ENDANGERED SHORTNOSED STURGEON, EVIDENCES FULL COMPLIANCE WITH THE ENDANGERED SPECIES ACT BY THE U.S. ARMY CORPS OF ENGINEERS	35
VI. ALL OF THE ADMINISTRATIVE AGENCIES CARRIED OUT THEIR REVIEW AND DECISION MAKING RESPONSIBILITIES IN GOOD FAITH.	39

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., et al., :
Plaintiffs :

v. :

CIVIL ACTION
NO. 82-5115

BALDWIN, et al., :
Defendants. :

NESHAMINY WATER RESOURCES AUTHORITY'S
PROPOSED FINDINGS OF FACT

I. HISTORY OF PRIOR ACTIONS, ENVIRONMENTAL REVIEWS AND
APPROVALS

1. A water study of the Neshaminy Creek Basin was undertaken under the co-sponsorship of the predecessor to Pennsylvania Department of Environmental Resources, the U.S. Soil Conservation Service, Bucks County and Montgomery County. As a result, the Neshaminy Creek resource plan was developed. This study included recommendations to construct, inter alia, a Point Pleasant Pumping Station, a taking point for water supply purposes at Chalfont, and ten dam structures along the Neshaminy Creek, including the dam that has created Lake Galina. (NWRA Exhibit 13, p. 14).

2. On October 26, 1966, the Watershed Project for Neshaminy Creek was approved by the Delaware River Basin Commission and was added to the Delaware River Basin Comprehensive Plan. The decision was supplemented on January 25, 1967, by adding the entire multi-purpose project as described in the 1966 Water Resources Study to the DRBC Comprehensive Plan. (Neshaminy Creek Watershed Project, Bucks and Montgomery County, Pennsylvania, DRBC Docket No. D-65-76CP and Bucks and Montgomery County Commissioners, Neshaminy Creek Water Shed Project, Bucks and Montgomery Countys, Pennsylvania, DRBC Docket No. D-65-76CP(2), NWRA Exhibit 13, pp. 14-15).

3. On December 8, 1970, the Pennsylvania Water and Power Resources Board issued to Bucks County Water Allocation Permit No. WA-649 authorizing the withdrawal of Delaware River water for public water supply purposes. (NWRA Exhibit 13, p. 15).

4. On March 17, 1971, the DRBC amended its Comprehensive Plan to include an enlarged Point Pleasant Pumping Station to supply additional amounts of water for public water supply and, in addition, to provide water to PECO for Limerick. This amendment was as a result of a feasibility study prepared in 1970 at the request of DRBC. (NWRA Exhibit 13, pp. 15-16).

5. In February, 1973, DRBC completed and submitted to the counsel on Environmental Quality the Environmental Impact Statement on the Point Pleasant Diversion Plan, a project which included the withdrawal of up to 150 million gallons per day

(mgd) of water from the Delaware River at Point Pleasant to be conveyed to the Chalfont Water Treatment Plant and to Limerick. (Final Environmental Impact Statement on the Point Pleasant Diversion Plan, Bucks and Montgomery Countys, Pennsylvania, NWRA Exhibit 13, p. 16).

6. DRBC concluded in its Final Environmental Impact Statement that the proposed project would be beneficial to the Neshaminy and Perkiomen Watersheds and not detrimental to the Delaware River Basin. (NWRA Exhibit 13, p. 16).

7. In January, 1977, Bucks County completed a study of water supply needs of Central Bucks County and the alternatives for meeting those needs. The study concluded that the Neshaminy Water Supply System was the best overall. (Central Bucks County Water Supply Study, NWRA Exhibit 13, p. 16).

8. In February, 1977, Montgomery County completed a study of the water supply needs in Central Montgomery County and the alternatives for meeting those needs. Said study concluded that the Neshaminy Water Supply System was the best overall. (Water Supply Study for Montgomery County, NWRA Exhibit 13, p. 16).

9. In March, 1977, the Delaware Valley Regional Planning Commission completed its Interim Population Projection Report including, therein, projections for the population by the year 2000 in Central Bucks and Central Montgomery Countys. (Interim Projections Report for Bucks, Chester, Delaware,

Montgomery, Philadelphia Countys, Pennsylvania, NWRA Exhibit 13, p. 16).

10. In conjunction with the results of the three last-referenced reports, NWRA initiated the preparation of its Environmental Report which included re-evaluation of the Neshaminy Water Supply Project as described in the DRBC Comprehensive Plan and an evaluation of the information contained in the DRBC Environmental Impact Statement on the Point Pleasant Diversion Plan. In conjunction with the preparation of this Report, NWRA drew on the expertise of aquatic biologists, environmental engineers, archeologists and other consultants. (NWRA Exhibit 13, p. 17).

11. On the basis of the above-referenced studies and reports, the designed capacity of the Treatment Plant at Chalfont was selected to remain at 20 mgd for the initial installation; however, the ultimate capacity of the Treatment Plant was reduced from 80 to 40 mgd to meet the supplemental water needs of the service area of Central Bucks and Montgomery Countys. (NWRA Exhibit 13, p. 16).

12. In September of 1978, NWRA submitted to the Department of Environmental Resources an application for a modification to the Water Allocation Permit along with an updated report. The report concluded that there is a need for less supplemental water supply than originally projected in 1970. (NWRA Exhibit 13, p. 17).

13. In November, 1978, the Department of Environmental Resources issued Water Allocation Permit No.

0978601 to NWRA, superseding the originally issued Water Allocation Permit. This Permit was issued together with an exhaustive report prepared by the Department of Environmental Resources supporting and justifying the issuance of the new permit. The new permit granted NWRA, under certain conditions, the right to withdraw water from the Delaware River at Point Pleasant as well as from Pine Run and North Branch of Neshaminy Creek to provide up to 40 mgd of potable water to Central Bucks and Central Montgomery Countys. This potable water would supplement the existing limited groundwater supplies. (DER Water Allocation Report, November 1, 1978, NWRA Exhibit 13, p. 17).

14. Concurrent with all of the above-mentioned reviews of the basic Point Pleasant Project and Neshaminy Water Supply System, the Atomic Energy Commission completed the preparation of its Final Environmental Impact Statement on the Limerick Generating Station which incorporates, by reference, the Environmental Impact Statement prepared by the DRBC. (Final Environmental Impact Statement relating to the proposed Limerick Generating Stations, Units I and II, Philadelphia Electric Company, NWRA Exhibit 13, pp. 17-18).

15. Based on the Final Environmental Impact Statement prepared by the Atomic Energy Commission, the previous Environmental Impact Statement prepared by the DRBC, and the records compiled at public hearings held before the Atomic Safety and Licensing Board and the Appeal Board of the Nuclear Regulatory Commission, the Nuclear Regulatory Commission issued

to Philadelphia Electric Company construction permits for the Limerick Plant in March, 1975. (In the Matter of Philadelphia Electric Company (Limerick Generating Station, Units I and II), Docket Nos. 50-352 and 50-353 (March 19, 1975), NWRA Exhibit 13, p. 18).

16. An appeal was taken to the Third Circuit Court of Appeals and they decided, inter alia, that the Environmental Impact Statement prepared by the Atomic Energy Commission and DRBC met the requirements of the National Environmental Policy Act. (Environmental Coalition of Nuclear Power, et al. v. NRC, Docket No. 75-1421 (November 12, 1975), NWRA Exhibit 13, pp. 18-19).

17. In February 1979, NWRA issued its draft Environmental Report. (NWRA Exhibit 14).

18. On May 30, 1979, NWRA held public hearings on its draft Environmental Report. (NWRA Exhibit 14).

19. On July 5, 1979, NWRA filed its application for Section 3.8 approval under the Delaware River Basin Interstate Compact with DRBC which was accompanied by its Environmental Report, the transcript of the Public Hearing of May 30, 1979, and a report prepared by NWRA responding to the comments received at the May 30, 1979 Public Hearing. (NWRA Exhibit 13, p. 20).

20. When NWRA filed its application for Section 3.8 approval with DRBC, DRBC had available to it three Final Environmental Impact Statements, together with all the supporting data. They were: (1) "Point Pleasant Diversion

Plan, Bucks and Montgomery Countys," prepared by DRBC in 1973; (2) "Limerick Generating Station, Units I and II," prepared by the Atomic Energy Commission in 1973; and (3) "Neshaminy Creek Water Shed," prepared by the U.S. Department of Agricultural, Soil Conservation Service in 1976. (NWRA Exhibit 13, p. 20).

21. In February, 1980, pursuant to the Rules of Practice and Procedure §2-4.3, DRBC issued its Environmental Assessment of the Neshaminy Water Supply System and related components and, at the same time, the Executive Director issued a notice of his intent to issue a "Negative Declaration." DRBC invited public comment to these documents. Notice of the Executive Director's intent was forwarded to all relevant federal and state agencies; also notice of the Executive Director's action was given at the DRBC public meeting of March 10, 1980. (NWRA Exhibit 13, pp. 20-21).

22. In August, 1980, pursuant to DRBC's Rules of Practice and Procedure, §2-4.4, DRBC issued its Final Environmental Assessment for the Neshaminy Water Supply System including the issuance by the Executive Director of a "Negative Declaration." Public notice of his recommendation to issue a "Negative Declaration" was sent to all the relevant state and federal agencies; also, said action was announced at the DRBC public meeting of August 27, 1980. (NWRA Exhibit 13, pp. 20-21).

23. On November 18, 1980, pursuant to public notice and DRBC's Rules of Practice and Procedure, §2-1.5, a public hearing was held on DRBC's proposal to amend its Comprehensive

Plan and to grant Section 3.8 approval under the Interstate Compact to NWRA and PECD to construct the components of the Neshaminy Water Supply System. (NWRA Exhibit 13, p. 21).

24. On February 18, 1981, DRBC authorized an amendment to the Comprehensive Plan and granted the Section 3.8 applications of both PECD and NWRA, subject to certain expressed conditions and limitations. (NWRA Exhibits 2 and 3).

25. The actions taken by DRBC in February, 1981 were reviewed by the U.S. District Court, Eastern District of Pennsylvania, in the matter of Delaware Water Emergency Group, et al., v. Gerald M. Hansler, et al., 536 F. Supp. 26(E.D. Pa. 1981). The primary issue before the court was whether the DRBC had fully and fairly considered the environmental impact of the proposed project in conformity with the National Environmental Policy Act of 1969.

26. In rendering his decision rejecting the challenges that the DRBC Environmental Assessment failed to comply with the National Environmental Policy Act, Judge VanArtsdalen concluded:

X
The record in this case makes four matters quite obvious. First, there have been at least three prior EISs on the basic plan and concept, all of which were available and considered by DRBC. With the Level B Study, there have been at least four EISs prepared. Second, the project has been under constant study and updating of factual information from the plans inception to the present time, and indeed is subject to ongoing studies. Third, the only substantial change from heretofore approved the plans based on prior Environmental Impact Statements and other studies, is a substantial

- 8 -

* Not adopted by the Court

A 80

reduction in the quantity of water to be withdrawn from NWRA's Water Treatment Plant. Fourth, the Environmental Assessment prepared is detailed, up-to-date and adequately considers any changed circumstances.

27. On Appeal to the Third Circuit Court of Appeals, the Third Circuit affirmed, without opinion, Judge VanArtsdalen's decision. (Delaware Water Emergency Group, et al. v. Gerald M. Hansler, et al., 681 F.2d 805 (3d Cir. 1982).

28. Following a preliminary meeting among PECO, NWRA and the U.S. Army Corps of Engineers Staff (Corps), by letter dated September 8, 1980, PECO and NWRA provided to the Corps a joint submission describing the Point Pleasant Pumping Facilities and Associated Systems. Said submission provided detailed information of all facilities including the treatment plant and all transmission mains. (Plaintiffs' Exhibit 15 and 60).

29. By letter dated October 28, 1980, after review of all material submitted by PECO and NWRA, the Corps advised PECO and NWRA that it had determined that two (2) permit applications were to be submitted; one (1) for the Pine Run rechannelization and one (1) for the Point Pleasant intake structure. All other facilities were covered by the "nationwide" permit program.

30. As a result of the Corps directive, in December, 1980, NWRA applied to the U.S. Army Corps of Engineers for a permit (Application No. WAPOP-R-800534-3) to construct a water intake structure in the Delaware River and under the Pennsylvania Canal at Point Pleasant and for a permit

(Application No. NAPOP-R-80-813-3) to rechannel a portion of Pine Run adjacent to the site for the water treatment plant. (Corps of Engineers, Exhibit 5).

31. On April 6, 1981, the Corps issued a public notice that NWRA had applied for the above-referenced permit. (Corps of Engineers Exhibit 3, p. 1).

32. On August 10, 1981, the Corps issued a notice of public hearing concerning NWRA's application for permits and scheduled said hearing for September 15, 1981. (Corps of Engineers Exhibit 2, p. 8).

33. On September 15, 1981, a public hearing was held on the NWRA applications at the Bucks County Community College, Newtown Township, Pennsylvania. The public hearing was attended by approximately 1000 concerned persons. (Corps of Engineers Exhibit 2, p. 8).

34. A record of the public hearing was prepared and notice of its availability was published on January 11, 1982. (Corps of Engineers Exhibit 2, p. 8).

35. The Commonwealth of Pennsylvania, Department of Environmental Resources, in conjunction with its evaluation of NWRA applications for, inter alia, the water intake structure, prepared an "Environmental Assessment." (NWRA Exhibit 13).

36. Said Environmental Assessment was issued in August of 1982 contemporaneously with the issuance of permits to NWRA and PECC. (NWRA Exhibit 13).

37. Said Environmental Assessment was forwarded to the Corps and reviewed by the Corps. (Corps of Engineers Exhibit 2).

38. On October 14, 1982, the Corps of Engineers issued an Environmental Assessment in conformity with the National Environmental Policy Act of 1969. (Neshaminy Water Resources Authority, Point Pleasant Diversion Project, Point Pleasant, Bucks County, Pennsylvania, Environmental Assessment, Corps of Engineers Exhibit 3).

39. The Environmental Assessment prepared by the Corps concluded, inter alia, that the issuance of a §10/404 permit did not constitute "major federal action" and that the installation of the water intake, conduit and pumphouse will not "significantly effect the environment." (Corps of Engineers Exhibit 3, pp. 17-18.)

40. On October 25, 1982, the U.S. Corps of Engineers issued permit No. NAWOP-R-80-534-3 to MWRA permitting MWRA to construct a water intake structure in the Delaware River/ Delaware Canal at Point Pleasant, Bucks County, Pennsylvania. (Corps of Engineers Exhibit 2).

II. THERE HAVE BEEN NO SIGNIFICANT CHANGES IN THE POINT PLEASANT PROJECT OR SURROUNDING ENVIRONMENTAL CIRCUMSTANCES SINCE JUDGE VANARTSDALEN'S DECISION IN DELAWARE I.

A. There will be No Adverse Impact on Fish and Aquatic Biota From The Change in the Location of the Intake Structure.

41. A 1978 Report prepared by RMC Corporation and the NWRA Environmental Report prepared in 1979 evaluated the effect that a shoreline intake would have on the aquatic life in the Delaware River. (W.T. 206, NWRA Exhibit 14).

42. The Environmental Assessment prepared by DRBC in February of 1980 concluded that such a shoreline intake would not cause a significant impingement or entrainment of aquatic life and as a result there would be no significant adverse effects. (DRBC Exhibit 3, page 2-37, 2-38).

43. During the pendency of the DRBC evaluation of NWRA's pending 3.8 application, a report was submitted by NWRA to DRBC entitled "Biological Evaluation of the Proposed Water Intake in the Delaware River at Point Pleasant, Pennsylvania." Said report was prepared by P. L. Harmon of the Pottstown Ecological Laboratories. (Harmon, 1980 Report, NWRA Exhibit 35).

44. The Harmon 1980 Report evaluated the effects of a wedge-wire intake structure located 200 feet from the Pennsylvania shore on all forms and stages of aquatic life located in the area of Point Pleasant; the evaluation included

an analysis of the impacts on all stages of American Shad, from the larvae stage up to adult. For purposes of his evaluation, he assumed it was a nursery and spawning area for shad. (NWRA Exhibit 35 pp 8-12).

45. The Harmon 1980 report concluded that the wedge-wire intake will effect a marked reduction in potential entrainment and impingement losses of aquatic life when compared to a conventional travelling screen design (shoreline intake). The operation of the proposed intake will not result in biologically significant impacts of the resident or migratory fish populations (NWRA Exhibit 35 p. 1).

46. At the time of the approval of the Docket Decision D-65-76 CP (8) by DRBC in February 18, 1981, DRBC engineering division and environmental unit staff had already reviewed the intake design change. (NWRA Exhibit 34; NWRA Exhibit 3, p. 8).

46. The only environmental impact not considered by DRBC of the intake structure on aquatic life was the effect said intake structure would have on shortnosed sturgeon. The existence of shortnosed sturgeon eight miles downstream from Point Pleasant was not determined until after the completion of the DRBC Environmental Evaluation. (Delaware I p. 46).

48. Subsequent to the DRBC Environmental Evaluation, NWRA proposed to extend the intake structure further into the river where velocities are greater. It was proposed to extend the intake an additional 45 feet into the river. (NWRA Exhibit 3).

49. The flow velocities of the river 245 feet from shore are greater than those velocities 200 feet from shore (NWRA Exhibit 6; NWRA Exhibit 35 p. 15).

50. Based upon a review of velocity measurements and the river contours, the back eddy in the river extends out 150-160 feet from the west bank. (NWRA Exhibit 4, Exhibit 6 and Exhibit 35).

51. The Fish and Wildlife Service concluded, in a letter dated March 26, 1982, that the location of the intake 45 feet farther out into the Delaware River and use of Johnson wedge-wire screens with a maximum inflow velocity of .5 feet per second and 2mm spacing will reduce localized adverse effect on the fishery. If a flow greater than 2,000 cfs can be maintained in the river at Point Pleasant, Fish and Wildlife Service expects very little negative effect on flow patterns in the back eddy caused by the change in the location of the intake structure (NWRA Exhibit 4 and DHEC Exhibit 16).

52. Even under the worst possible case conditions, the effect on aquatic life of a maximum withdrawal of 95 mgd, at a river flow of 2,500 cfs, will be practically nil. (NWRA Exhibit 7).

53. The eddy area is located at least 62 feet shoreward of the intake structure, at least 62 feet away from the intake location. (NWRA Exhibit 10).

54. Upon the completion of review by the Corps' Hydrology-Hydraulics Branch of materials submitted by Del-Aware and by GKY and Associates, Inc., it concluded that the subject

report does not provide any substantive or significant arguments for requiring additional investigation. Further, it was concluded that said reports tended to reveal a bias. (NWRA Exhibits 8, 9 and 10).

55. There is substantial and reasonable evidence in the record to support the Corp's conclusion that the proposed intake alignment intercepts the actual river channel and thus the main river at about a right angle and approximately 800 feet downstream of the mouth of the Tobickon Creek. (Corps of Engineers Exhibit 2 p. 20).

56. The maximum intake velocity of the intake structure will be .5 feet per second only when the maximum 95 mgd is being withdrawn. The average intake velocity, at that time, is .35 feet per second, and as the amount of water withdrawn reduces, the intake velocity reduces in a linear relationship. (NWRA Exhibit 7 and Plaintiff Exhibit 66).

57. The average flow velocity toward the screens, at 1 foot away from the screens, at the maximum rate of withdrawal, will only be approximately .1 feet per second. (Plaintiffs' Exhibit 66 p. 3).

58. When DRBC is not able to achieve a flow of Trenton of 3,000 cfs through the management of water stored within the Basin complementing natural flows, only water for public water supply purposes will be able to be withdrawn at Point Pleasant until PECO is able to provide its own storage facilities. (DRBC Exhibit 1 and 9, NWRA Exhibits 1, 2 and 3).

59. When flows are below 3,000 cfs, it is highly unlikely that NWRA will be able to withdraw the maximum amount it is allowed to withdraw for public water supply, 49 mgd, due to numerous factors, including DRBC Regulations and Conditions included in Docket Decision No. D-65-76CP(8). (NWRA Exhibit 3, Conditions Y and Z, NWRA Exhibit 7, DRBC Exhibit 9, DRBC Exhibit 1).

60. NWRA will not be able to withdraw the maximum amount for public water supply purposes unless such withdrawals are subsequently approved by DER through subsidiary water allocation permits (NWRA Exhibit 13, p. 65).

61. There was substantial evidence in the Corps record for it to conclude that the withdrawal of water as permitted and regulated by the DRBC will have no significant adverse impact on the Delaware River System. Withdrawal of water, even during low flow conditions, will result in no significant adverse impact on aquatic organisms due to entrainment and impingement; such intake represents the "State of the Art" technology with respect to intake structure design. (Corps of Engineers Exhibit 2 p. 15).

62. If, under unforeseen circumstances, an adverse impact upon aquatic life is noted, both DRBC and DER will require such corrective action as appropriate to mitigate such impact. (NWRA Exhibit 13, p. 32, NWRA Exhibit 3, Condition M).

63. No significant dangers are anticipated as a result of the backwashing of the intake structure (NWRA Exhibit 11).

64. The minimum surface elevation at a flow of 3,000 cfs is in excess of 70 feet and thus there will be at least a minimum of 4 feet of water between the top of the intake and the surface of the river at 3,000 cfs (NWRA Exhibit 5, Plaintiffs' Exhibit 66).

65. There is substantial evidence in the record to support DRBC conclusion that the design changes to the intake structure should reduce the degree of adverse biological impact from that already approved as of February, 1981. (p. 11, Staff Response, DRBC Exhibit 1).

B. No Significant Impact Will Be Caused On The Dissolved Oxygen Levels Or On The Salinity Levels In The Delaware River As A Result Of The Withdrawals At Point Pleasant.

66. There have not been any substantial changes in circumstances from February 18, 1981, that would cause any difference in the impacts caused by the withdrawal of water from Point Pleasant upon the dissolved oxygen and salinity levels in the Delaware River. (DRBC Exhibit 1: DRBC Resolution #82-22 and Staff Response to Petitioners' Factual Allegations of 9/24/82).

67. DRBC concluded in February, 1981, based upon its analysis of the affects of withdrawals, including materials contained in the Level B Study, that the effects of withdrawal at Point Pleasant when flows at Trenton are 3,000 cfs or lower, on salinity levels would be virtually immeasurable. (DRBC

Exhibit 3, p. IV-16, DRBC Exhibit 1, p. 3 of Staff Response, NWRA Exhibit 13, p. 84).

68. Because there is no change in the rate of withdrawal projected by NWRA or the use of the water as projected by NWRA from that which was proposed in 1981 and, further, in light of the fact that there is no change in the circumstances concerning the flow of Delaware River water, the impacts on salinity, as evaluated in 1981, are unchanged. (DRBC Exhibit 1).

69. The withdrawal of water at Point Pleasant will have an insignificant impact upon dissolved oxygen levels in the Delaware River even at flows as low as 2,000 cfs. (DRBC Exhibit 2, pp. 26-28, NWRA Exhibit 13, pp. 84, 88 and DRBC Exhibit 3).

70. The withdrawal of water at Point Pleasant will not affect the shad runs because the dissolved oxygen levels are substantially reduced at approximately river mile 93 based upon pollution discharges to the Delaware River which have a significant impact on the dissolved oxygen levels. (DRBC Exhibit 2).

71. The dissolved oxygen model used by DRBC did consider the effects of accumulated sediment deposits. (DRBC Exhibit 2, p.26).

72. It is not possible to significantly ameliorate the impacts of pollution loads upon dissolved oxygen concentration throughout the estuary by releasing stored water,

because of the vast amounts required to have a significant impact. (DRBC Exhibit 2, p. 76).

73. Only 3% of the time, since 1971, has the flows in the Delaware River been below 3,000 cfs. (Staff Response, p. 3, DRBC Exhibit 1).

74. There has been no change in the amounts of water to be withdrawn at Point Pleasant, the use of the water to be withdrawn, or the flows in the Delaware River from those considered in 1981. (DRBC Exhibit 1).

75. There is substantial evidence in the record to support the Corp's conclusion that the withdrawal of water as permitted and regulated by the Delaware River Basin Commission will have no significant adverse impact on the Delaware River System. The project, with conditions imposed by the DRBC, will have no significant affect on salinity intrusion of well fields and surface water users of the Delaware River. Withdrawal of water, even during low flow conditions, will have a biologically insignificant effect on downstream dissolved oxygen concentrations. (Findings of Fact p. 15, Corps Exhibit 2).

76. Flows in the East Branch Perkiomen Creek and North Branch Meshaminy Creek will be augmented by the project releases and minimum flows will be maintained under the project operating plan. The natural flow of the streams will not be diminished but will be augmented and enhanced, especially during low flow periods. (NWRA Exhibit 14, pp V-26-V-23; DRBC Exhibit 3, pp. 2-39-2-43; 2-51-2-53; IV-39; and appendix E;

NWRA Exhibit 13, pp. 46-59, 89; DRBC Exhibit 1, Staff Response, p. 14).

C. Groundwater Is Not A Viable Or Feasible Alternative To Surface Water Supply.

77. In studies undertaken prior to February, 1979, it was found that groundwater was inadequate to meet all of the future public water supply needs of Central Bucks and Montgomery Counties. The "no-action alternative" would deprive the residents of these counties of a safe, adequate water supply system and adverse economic and environmental conditions could be anticipated. The most prominent adverse conditions would be the lack of water for domestic, commercial and industrial needs, the drying up of surface water streams of the areas, and the contamination of the groundwater aquifer by over pumping of wells in an attempt to meet the water demands.

(Environmental Report on the Neshaminy Water Supply System, Neshaminy Water Resources Authority, February 1979, p. VII-7, NWRA Exhibit 14).

78. In August 1980, the Delaware River Basin Commission concluded that further development of groundwater was considered the "least desirable water supply alternative" for Central Bucks and Montgomery Counties. (Final Environmental Assessment for the Neshaminy Water Supply System, Delaware River Basin Commission, August 1980, pp. 2-28, DRBC Exhibit 3).

79. In 1980 and early 1981, the Eastern Pennsylvania Region endured a period of moderate to serious rainfall

shortages. By March 1981, over 4,000 domestic wells in this region had gone dry as a result of this drought. Four thousand families found themselves without water for essential drinking, sanitation and other domestic uses; costs of replacing these supplies represented an economic loss of over \$6.7 million.

(DER Environmental Assessment Report and Findings, Point Pleasant Water Supply Project, August 1982, p. 69, NWRA Exhibit 13).

80. In a special groundwater study of the Middle Delaware River Basin prepared by R. E. Wright Associates, Inc. for the Delaware River Basin Commission, Wright Associates concluded that groundwater withdrawals exceed dry year recharge in large areas of Bucks and Montgomery Counties. (Special Groundwater Study of the Middle Delaware River Basin, R. E. Wright Associates, Inc., July 1982, Vol. III, Chapter XIII, Plaintiffs' Exhibit 14).

81. Based on the information contained in the R.E. Wright Associates Groundwater Study prepared for the Delaware River Basin Commission, the Department of Environmental Resources determined in August, 1982, that further development of groundwater, as an alternative to a supplemental surface water supply, was an unacceptable option for the Central Bucks and Montgomery County Region. (Environmental Assessment, Report and Findings, Point Pleasant Water Supply Project, Department of Environmental Resources, August 1982, p. 71, NWRA Exhibit 13).

82. In September 1982, the Delaware River Basin re-evaluated the groundwater alternative to the Neshaminy Water Resources Authority Water Supply Project. The DRBC concluded, inter alia, that further development of the groundwater is an unacceptable option for the Central Bucks and Montgomery Counties. (Staff Response to Petitioners' Factual Allegations of September 24, 1982, Allegation 4-H, pp. 17-19, DRBC Exhibit 1).

III. THE U.S. ARMY CORPS OF ENGINEERS FULLY COMPLIED WITH THE MANDATES OF SECTIONS 106 AND 110(F) OF THE NATIONAL HISTORIC PRESERVATION ACT.

83. A 1978 report, commissioned by NWRA and written by two University of Pennsylvania Archeologists, Urban and Schortman, concluded that the Point Pleasant Pumping Station would not adversely effect potential archeological resources or historical resources, including the Delaware Division of the Pennsylvania Canal ("Canal") and the Village of Point Pleasant, if mitigation procedures as outlined in the report are followed. (Plaintiffs' Exhibit 44, pp. 35-37).

84. NWRA, based upon the Urban and Schortman Report, set forth in its 1979 Environmental Report procedures to be followed for placing of the intake conduit under the Canal, including the on-site presence of an archeologist. NWRA also proposed to design the Pump Station Building in a manner to conform with its surroundings. (NWRA Exhibit 14, Appendix C).

85. DRBC evaluated the Urban and Schortman Report and NWRA's Environmental Report and concluded that the Point Pleasant Pumping Station would result in no adverse impact upon nearby cultural resources, including the Canal. (DRBC Exhibit 3, pp. 30-34).

86. The designated State Historic Preservation Officer ("SHPO") in Pennsylvania is the Pennsylvania Historical and Museum Commission.

87. After reviewing DRBC's Final Environmental Assessment, the SHPO advised DRBC that the SHPO agreed that the Point Pleasant Pumping Station would have no adverse impact upon archeological resources in the area. The SHPO further said that the Point Pleasant Pumping Station would have a technical adverse impact upon the Canal which could be adequately mitigated by archeological monitoring of the project excavation as proposed. (NWRA Exhibit 16).

88. DRBC's approval under Section 3.8 of its Compact was conditioned upon adoption of the measures in Appendix C of NWRA's Environmental Report. (NWRA Exhibit 3).

89. DRBC was advised that consultation with the Advisory Council on Historic Preservation ("ACHP") under the National Historic Preservation Act of 1966 would be required in conjunction with review of the Point Pleasant Pumping Station. (NWRA Exhibit 16, Plaintiffs' Exhibit 45).

90. DRBC deferred to the Army Corps of Engineers in conjunction with the latter agency's review of NWRA's permit application for the construction of the intake structure, to

act as lead agency for the purpose of consultation with ACHP. (Plaintiffs' Exhibit 45).

91. Upon the recommendation of the SHPO, the Corps commissioned Ms. Elizabeth Mintz to prepare a report on the proposed Point Pleasant Historic District to be submitted to the Keeper of the National Register in support of a request by the Corps for a determination of eligibility of the Point Pleasant Historic District for inclusion in the National Register. (NWRA Exhibit 29-1).

92. On December 15, 1981 the Corps submitted to the keeper of the National Register said report along with its request for determination of eligibility and comments on the report prepared by the Bucks County Conservancy, NWRA and the Pennsylvania Historical and Museum Commission ("PHMC"). (Plaintiffs' Exhibit 48).

93. On December 29, 1981, the Point Pleasant Historic District was determined eligible for the National Register of Historic Places by the Keeper of the Register. Upon receipt of the Determination of Eligibility, the Corps began its consultation with ACHP in fulfillment of the responsibilities imposed by the National Historic Preservation Act of 1966 and its implementing regulations. (Plaintiffs' Exhibit 49).

94. In the meantime, there was an on-going consultation among the SHPO, NWRA, the Corps and the Heritage Conservation and Recreation Service ("HCRS") to develop plans for the aboveground elements of the Point Pleasant Pumping

Station which would either avoid or mitigate any potential adverse effects upon the Village of Point Pleasant.

95. On May 27, 1981, representatives of NWRA, the Corps, SHPO, and the HCRS attended a meeting at the site of the proposed Point Pleasant Pumping Station at which NWRA's plans for the design of the Pump Station Building and its attendant landscaping were reviewed and approved. (NWRA Exhibit 18).

96. On September 28, 1981, the SHPO formally approved NWRA's plans for the design of the Pump Station Building and its attendant landscaping and advised the Corps that, in the opinion of the SHPO, the proposed structure would not have an adverse impact upon the Village of Point Pleasant should it be determined eligible as an historic district. (NWRA Exhibit 19, Appendix F).

97. NWRA's plans for the design of the Pump Station Building and its attendant landscaping were also submitted to the ACHP. (Letter dated January 19, 1982 from E. H. Bouquard to Charlene [sic] Dwin, attached to letter dated March 18, 1982 from Ann A. Nevel to Richard Hassel, Army Corps of Engineers. (Certified Record, Part B).

98. The Corps commissioned Ms. Elizabeth Nintz to prepare a Preliminary Case Report which, when completed, was circulated, inter alia, to the SHPO, the ACHP and the Bucks County Conservancy. (NWRA Exhibit 19).

99. The Preliminary Case Report included the opinions of the Bucks County Conservancy and of Del-ANARE, Unlimited, Inc. as representative of the views of others who had expressed

concern about the potential affect of the proposed water intake facilities on historical and archeological resources in the vicinity and stated that those opinions had been noted by the Corps. (NWRA Exhibit 19, p. 15).

100. The Preliminary Case Report was submitted to the ACHP with a determination by the Corps that the Point Pleasant Pumping Station would have no adverse impact upon the Point Pleasant Historic District but would have a technical adverse effect upon the Canal which would be adequately mitigated if N.W.R.A.'s proposed construction procedures were implemented. (NWRA Exhibit 20).

101. The SHPO praised the Preliminary Case Report, however, reversed its earlier approvals and called for Pre-Construction Archeological Testing and Evaluation at the site. (NWRA Exhibit 21).

102. The ACHP, in conjunction with the Corps and the SHPO, with input from the Bucks County Conservancy and the BCBS, developed a Memorandum of Agreement designed to mitigate or avoid any potential adverse affects that may be caused by the Point Pleasant Pumping Station. The development process included a meeting attended by representatives of Del-AWARE Unlimited, Inc., the Bucks County Conservancy, the Corps, the ACHP, the SHPO and the BCBS.

103. The Memorandum of Agreement was signed by representatives of the Corps, the SHPO, and the ACHP. The Memorandum of Agreement is an attachment to and a condition of, NWRA's Permit from the Corps. (Corps of Engineers Exhibit 3).

104. In its Preliminary Case Report, the Corps noted that "every effort has been made to minimize harm to the Canal which may result from the present proposal for the location, design and construction of the water intake facilities. In light of the alternatives discussed and mitigation procedures outlined, the present proposal represents the most feasible and prudent course of action." (NWRA Exhibit 19, p. 14).

105. There has been and will be no Federal Funding for the Point Pleasant Pumping Station. (NWRA Exhibit 19, p. 17).
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106. The Canal is neither federally owned nor federally controlled. (NWRA Exhibit 22).

107. Alternatives to the Weshaminy Water Supply System as a whole as well as to the Point Pleasant Pumping Station were evaluated and rejected as infeasible by NWRA in the 1979 Environmental Report and by DHEC in its Final Environmental Assessment of 1980. (NWRA Exhibit 19, Appendix D).

108. On June 14, 1982, in response to a report written by Del-ANARE Unlimited, Inc. outlining proposed alternatives to the Point Pleasant Water Diversion Project, NWRA advised the Corps that NWRA and the expert regulatory agencies in their respective reviews and evaluation of the Weshaminy Water Supply System, have long been aware of, have fully studied and evaluated, and have rejected as infeasible, all the alternatives specifically suggested by Del-ANARE Unlimited, Inc. (NWRA Exhibit 23).

109. On August 13, 1982, the Secretary of the Pennsylvania Department of Environmental Resources ("DER") advised the ACHP that DER, in the process of preparing its Environmental Assessment in conjunction with the issuance of a Dams and Encroachment Permit to NWRA for the Point Pleasant Pumping Station, considered every alternative raised by Del-AWARE Unlimited, Inc. and other opponents of the project and that "none of the alternatives, or combinations of alternatives, was found to be more cost-effective or involved substantially less environmental impacts" than the proposed project. (NWRA Exhibit 13, pp 67-80; NWRA Exhibit 22).

110. The Corps was provided with the results of the Department of Environmental Resources 1982 evaluation of alternatives. (NWRA Exhibit 22; NWRA Exhibit 13).

111. The Corps' Preliminary Case Report concludes that the specific site selected for the Point Pleasant Pumping Station is virtually the only feasible one. (NWRA Exhibit 19, p. 12).

112. On September 9, 1982, the Corps advised the ACHP of the Corps confidence that there is no alternative but to cross the Canal for which planning steps had been taken to minimize any potential harm. (NWRA Exhibit 24).

113. The Department of Environmental Resources, the owner of the Canal, after its review and analysis of the construction procedures to be utilized in conjunction with the Canal crossing, granted approval of said procedures and concluded "that construction of the Point Pleasant project,

followed by restoration in accordance with the specifications approved by this agency, will leave the Delaware Canal in the vicinity of Point Pleasant in better shape than it is today." (NWRA Exhibit 13, pp. 43-46; NWRA Exhibit 22).

114. The Memorandum of Agreement requires NWRA to undertake an extensive archeological testing program prior to commencement of construction. (Corps of Engineers, Exhibit 5).

115. The Memorandum of Agreement requires NWRA to utilize specific construction and restoration procedures incident to the pipeline crossing under the Delaware Canal. (Corps of Engineers, Exhibit 5).

116. The Memorandum of Agreement requires NWRA to design the above ground facilities in consultation with the SEPO, landscape the area in a manner to minimize the visual impacts of the pumping station and boundary fence in the surrounding area. (Corps of Engineers Exhibit 5).

IV. THE U.S. ARMY CORPS OF ENGINEERS CONSULTED WITH THE FISH AND WILDLIFE SERVICE IN ACCORDANCE WITH THE SUBSTANTIVE PROVISIONS OF THE FISH AND WILDLIFE COORDINATION ACT.

117. In December, 1980, the U.S. Fish and Wildlife Service submitted substantive comments to the Delaware River Basin Commission for review in conjunction with the Delaware River Basin Commission's processing of NWRA's application for Section 3.8 approval. (Letter dated December 16, 1980 from Norman R. Chupp, Area Manager, U.S. Department of Interior,

Fish and Wildlife Service to the Delaware River Basin Commission, Corps of Engineers Exhibit 1).

118. From December 1980, to February 1981, the technical staff of the Delaware River Basin Commission reviewed and assessed the substantive concerns expressed by the Fish and Wildlife Service in their correspondence of December, 1980. (Staff Response to Chupp, December 16, 1980, statement in regard to the Weshaminy Water Resources Authority Project, Corps of Engineers Exhibit 1).

119. In February 1981, the Executive Director of the Delaware River Basin Commission notified the Honorable Sherman Tribbet, the Federal Representative on the DRBC, of the Delaware River Basin Commission's staff evaluation of the concerns expressed by the Fish and Wildlife Service. Contained therein was a detailed response to each and every issue raised by the Fish and Wildlife Service. (Letter dated February 4, 1981, from Gerald M. Hansler, Executive Director of the Delaware River Basin Commission to the Honorable Sherman W. Tribbet, Department of the Interior, with attachments, Corp of Engineers Exhibit 1).

120. The February 18, 1981 Docket Decision of the Delaware River Basin Commission clearly evidences DRBC's sensitivity to the issues that had been raised by the Fish and Wildlife Service. (NWRA Exhibit 3).

121. Condition "L" of the DRBC Docket Decision requires NWRA to cooperate with the Fish and Wildlife Service

in the choice of an intake structure design. (NWRA Docket Decision No. D-65-76CP(8), February 18, 1981, NWRA Exhibit 3).

122. Condition "N" of the DEBC Docket Decision requires NWRA to construct the intake structure in the river during the period between November through March "to reduce the potential for impact on migrating juveniles and adult shad." (NWRA Docket Decision D-65-76CP(8) February 18, 1981, NWRA Exhibit 3).

123. Condition "U" of the DEBC Docket Decision requires construction of the Delaware River intake and intake conduit to be controlled to minimize any and all impacts on existing wetland areas. (NWRA Docket Decision D-65-76CP(8), February 18, 1981, NWRA Exhibit 3).

124. The Delaware River Basin Commission consultation, review and conclusions with respect to the substantive concerns raised by the Fish and Wildlife Service were judicially approved by the United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals. (Del-Aware Water Emergency Group, et al. v. Gerald M. Hansler, et al., 536 F. Supp. 26 (E.D. Pa. 1981) *aff'd.*, 681 F.2d 805 (3d Cir. 1982)).

125. In June 1981, the U.S. Fish and Wildlife Service submitted to the U.S. Army Corps of Engineers substantive comments for consideration in the Corp processing of NWRA's permit application to build a water intake structure in the Delaware River at Point Pleasant. (Letter dated June 19, 1981, from the U.S. Department of the Interior, Fish and Wildlife

Service, to Colonel Ton, U.S. Army Corp of Engineers, Plaintiffs' Exhibit 65).

126. In July 1981, the Army Corp of Engineers requested the applicant, NWRA, to respond to the substantive comments raised by the U.S. Department of Interior, Fish and Wildlife Service. (Letter dated July 2, 1981, from Roy Denmark, Jr., Chief of the Corps, Permits Branch, to E.N. Bourquard, Engineer for Neshaminy Water Resources Authority, Corps of Engineers Exhibit 1).

127. By letter dated January 22, 1982, the applicant, NWRA, provided detailed substantive responses to the concerns expressed by the Fish and Wildlife Service in June 1981. The issues raised related to secondary impacts which have been fully evaluated by the DRBC when DRBC authorized NWRA to withdraw up to a maximum of 95 mgd from the Delaware River from Point Pleasant. Furthermore, the Fish and Wildlife Service's concerns regarding dissolved oxygen, diadromous fish, salinity intrusion in the Delaware Bay, effects of more "skimming reservoirs", and the effects of the diversion on the North Branch of the Neshaminy Creek and East Branch of the Perkiomen Creek were merely reiterations of the same concerns that had been raised by the Fish and Wildlife Service with the DRBC, all of which had been considered and addressed by the DRBC in Docket Decision No. D-65-76CP(8). (Letter dated January 22, 1982, to Lt. Col. Roger L. Baldwin, Army Corp of Engineers from Hershel J. Richman, attorney for Neshaminy Water Resources Authority, Corps of Engineers Exhibit 1).

128. In February 1982, the substantive comments and responses from Hershel J. Richman, attorney for Neshaminy Water Resources Authority, and E. H. Bouquard Associates, engineer for Neshaminy Water Resources Authority, were forwarded to the Fish and Wildlife Service by the Corps of Engineers for further evaluation and consultation. (Letter dated February 18, 1982 to Norman R. Chupp, U.S. Department of the Interior, Fish and Wildlife Service, from Roy E. Denmark, Jr., Chief, Permits Branch of the Corps of Engineers, Corps of Engineers Exhibit 1).

129. In March 1982, the Pennsylvania Fish Commission notified the United States Army Corps of Engineers indicating their opposition to the Point Pleasant Water Diversion Project. The Pennsylvania Fish Commission did not, however, state their reasons for such opposition nor did they indicate to the Corp what areas, if any, should be further evaluated in the permit application process. (Letter dated March 24, 1982, from Jack G. Miller, Chief, Fisheries Environmental Services, Pennsylvania Fish Commission, to Col. Roger L. Baldwin, District Engineer, Corp of Engineers, Corps of Engineers Exhibit 1).

130. In June, 1982, the Corp of Engineers responded to all of the substantive comments previously raised by Fish and Wildlife Service during the consultation process; specifically, "cumulative effects", "dissolved oxygen", and "salinity intrusion." (Letter dated June 1, 1982, from Col. Roger L. Baldwin, Corp of Engineers, to Norman R. Chupp, Area

Manager, U.S. Department of Interior, Fish and Wildlife Service, Corps of Engineers Exhibit 1).

131. In July, 1982, a new Memorandum of Agreement was entered into between the Department of Interior and the Department of the Army. Said Agreement adopted general policies and consultation procedures to be implemented by the two agencies in the Corp's processing of permit applications under §10 of the Rivers and Harbors Act, and §404 of the Clean Water Act. Additionally, the Memorandum of Agreement contained extensive procedures for review by a higher authority ("Elevation") in the event the Corps desired to issue a permit over outstanding objections by the Fish and Wildlife Service. (Memorandum of Agreement between the Department of Interior and the Department of the Army dated July 6, 1982, Corps Exhibit 4).

132. From July, 1982 to October, 1982, the Department of Interior, Fish and Wildlife Service and the U.S. Army Corps of Engineers continued consultation as required by the Fish and Wildlife Coordination Act; evidenced by approximately 15 pieces of correspondences between the two agencies. (Corps of Engineers Exhibit 1).

133. In September, 1982, in conformity with the Memorandum of Agreement entered into between the Department of the Army and the Department of the Interior, the Corps notified the Fish and Wildlife Service of their intent to issue a permit to WHRA. (Letter dated September 24, 1982 from Col. Roger L. Baldwin, Corp of Engineers, to Howard W. Larson, Regional

Director, U.S. Fish and Wildlife Service, Corps of Engineers Exhibit 1).

134. In October, 1982, the Fish and Wildlife Service responded to the Corps notice of intent to issue a permit to NWRA. Although expressing general opposition to the Point Pleasant project, the Fish and Wildlife Service notified the Corps that "Elevation" would not be sought. (Letter dated October 18, 1982, from Howard W. Larson, Regional Director of Fish and Wildlife Service to Col. Roger L. Baldwin, U.S. Army Corp of Engineers, Corps of Engineers Exhibit 1).

V. THE BIOLOGICAL OPINION OF THE NATIONAL MARINE FISHERIES SERVICE, DETERMINING NO SIGNIFICANT ADVERSE IMPACT ON THE ENDANGERED SHORTNOSED STURGEON, EVIDENCES FULL COMPLIANCE WITH THE ENDANGERED SPECIES ACT BY THE U.S. ARMY CORPS OF ENGINEERS.

135. Pursuant to the request of NMFS and the Corps, a biological assessment of the impacts of the Point Pleasant Pumping Station and associated intake structure on the endangered species of shortnosed sturgeon, Acipenser brevirostrum, was undertaken in 1981 by Harold M. Brundage of Ichthyological Associates, Inc. (NWRA Exhibit 36, p. 1).

136. Based on incidental capture records covering periods 1817 through 1981, the January 1982 biological assessment report states: "There is essentially no empirical information regarding utilization of the Delaware River near

Point Pleasant by shortnosed sturgeon." (NWRA Exhibit 36, pp. 70 and 51-67).

136. During Ichthyological Associates, Inc.'s intensive gill net sampling program, conducted from October through December 1981, no shortnose sturgeon were collected at the three sampling zones (1) upstream at Prahls Island, (2) Point Pleasant site or (3) downstream at Lumberville Wing Dam. (NWRA Exhibit 36, pp. 57-59).

138. All life cycles of the shortnose sturgeon including egg, larvae, juvenile, and adult stages, were portrayed in extensive detail in the January 1982 biological assessment and it concluded that "the Delaware River does not represent habitat unique or essential to shortnose sturgeon" and that "no critical habitat for the shortnose sturgeon has been designated." (NWRA Exhibit 36, pp. 72 and 35-50).

139. Construction of the intake structure will occur only from November through March; it is uncommon for shortnosed sturgeon to be in the upriver areas after August and is absent during mid-December through May. (NWRA Exhibit 36, p. 72).

140. No shortnose sturgeon should be present near the site during the construction period; however, assuming this species did occur at the site, a special submarine blasting procedure (designed to reduce concussion and minimize blasting vibrations) has been developed to minimize potential impact to aquatic life. Such procedure is based on considerable literature regarding physical properties of an underwater blast as related to the effect on fish. (NWRA Exhibit 36, p. 74).

141. Although there was no indication that the Point Pleasant area of the Delaware River is utilized by shortnose sturgeon, the January 1982 biological assessment assuming the "worst case" situation evaluated all potential impacts that the construction and operation of the Point Pleasant Pumping Station and intake structure could have on all life cycle stages of this species. (WWNA Exhibit 36, pp. 1 and 78-94).

142. The conclusions stated in the January 1982 biological assessment prepared by Ichthyological Associates, Inc. were: (1) no critical habitat for the shortnose sturgeon has been designated at Point Pleasant; (2) no shortnose sturgeon have been taken from such location either historically or during intensive net sampling program; (3) based on known seasonal movements and results of sampling, it is unlikely that shortnose sturgeon will occur in the vicinity of Point Pleasant during the construction periods November through March; (4) in the unlikely event that shortnose sturgeon did occur in the construction area, they would not be adversely affected by the construction because the increased turbidity is well within the species' tolerance range; (5) the Point Pleasant intake structure represents the state-of-the-art technology for mitigating entrainment/impingement of aquatic organisms and shortnose sturgeon during egg, larvae, juvenile, and adult life cycles; and (6) the project will have a biologically insignificant effect on downstream dissolved oxygen concentrations. (WWNA Exhibit 36, pp. 1-3).

143. Pursuant to Section 7(b) of the Endangered Species Act, NMFS reviewed the January 1982 biological assessment and all other available data concerning the potential impacts on the shortnose sturgeon and NMFS sent the Corps a Biological Opinion on July 19, 1982. (Corps of Engineers Exhibit 12).

144. NMFS' Biological Opinion dated July 19, 1982, concluded that "construction and operation of the Point Pleasant Pumping Station is not likely to jeopardize the continued existence of the endangered shortnose sturgeon in the Delaware River." (Corps of Engineers Exhibit 12, Biological Opinion, p. 16).

145. In its July 19, 1982 transmittal letter, NMFS advised the Corps that the Point Pleasant "project construction during the period November-March should cause no significant adverse effects on shortnose sturgeon present in the area....[and] the proposed state-of-the-art design of the water intake structure and projected schedule of withdrawals are adequate to ensure that juvenile and adult shortnose sturgeon as well as sturgeon eggs and larvae present in the project area will not be significantly affected." (Corps of Engineers Exhibit 12, p. 1).

146. NMFS advised Robert Sugarman (counsel to plaintiffs, Del-AWARE Unlimited, Inc.) by letter dated September 30, 1982, that the possibility of reduced by-pass velocities did not change the NMFS Biological Opinion which stated that "the operation of the Point Pleasant Pumping

Station would not be likely to jeopardize the continued existence of shortnose sturgeon in the Delaware River." (NWRA Exhibit 12, p. 1).

147. NWFS' "gave due consideration to the hydraulics of the proposed intake structure in the [biological] opinion, however, maintenance of river flow above 3,000 cfs throughout the year, was not a basis for our conclusionSturgeon movement patterns from other river systems show that these life stages [larvae and juvenile] are not likely to stay in the upper reaches of the river for very long....Delaware River water flows peak in March and April, therefore, adequate water velocity should be maintained past the intake structures in the early Spring when shortnose sturgeon are likely to be in the vicinity." (NWRA Exhibit 12, p. 1).

VI. All of the Administrative Agencies Carried Out Their Review and Decision Making Responsibilities in Good Faith.

148. At the outset of their involvement in this matter, the Corps advised NWRA that it wanted to examine the entirety of NWRA's planned activities in connection with the Point Pleasant Water Diversion Project to ascertain what was involved, the extent of the Corps' jurisdiction and the permits which would eventually be required by NWRA and PECO to complete the project. To this end, the Corps required submission of extensive detailed data from NWRA. (Plaintiffs' Exhibit 15).

149. By letter dated September 8, 1980 NWRA and PECO provided the information requested. (Corps of Engineers Exhibit 9).

150. Thereafter, the Corps processed NWRA's application for permits for the Point Pleasant intake and pumping station and for the Pine Run rechannelization together, including holding public hearings on the two permit applications together. The processing of the application on the Point Pleasant intake and pumping station was completed before completion of the application on Pine Run and it was issued. (Corps of Engineers Exhibit 5).

151. Given the limitations on construction applicable to the intake, the length of time projected for completion of the intake and pumping station, the projected date by which PECO may need water from the Delaware, and the fact that the approval of the Pine Run rechannelization is not essential for the completion and use of the Point Pleasant diversion, it was reasonable for the Corps to issue the permit for Point Pleasant before completion of review of Pine Run.

152. The Corps' attempt to persuade the Fish and Wildlife Service not to "elevate" its objections to the project was not, nor is it evidence of, an abuse of discretion.

153. The Corps' determination, on or about June 8, 1981, that the Bucks County Conservancy was not a viable prospective contractor to perform historical and archeological reviews of the area including the Village of Point Pleasant, was proper in light of the letter of March 29, 1981 from the

Conservancy to the Corps apologizing for previously sending the Corps certain incomplete and incorrect information and explaining that they did not have the resources or staff to perform detailed reviews, even on a contract basis. (NWRA Exhibit 17).

134. NWRA's suggestion that the action be taken under National Historical Preservation Act prior to the determination of whether the Village of Point Pleasant was eligible for inclusion on the National Register of Historical Places was not improper, because they offered to be bound by the requirements of the Act upon the assumption that Point Pleasant was eligible. Moreover, the Corps refused to permit such action until the determination was formally made, which only caused further delay in the processing of the permit.

135. Colonel Baldwin's refusal to meet, or to send a representative to meet, with representatives of Del-AMARE on-site in December 1981 or to attend a conference sponsored by Del-AMARE and apparently focused on opposing the project, was not an abuse of discretion, nor was it unreasonable.

136. There is no evidence of record from which it could reasonably be inferred that the Corps, or any other reviewing agency, acted other than in the good faith desire to carry out their responsibilities under the law.

MEP-8-80-134-3

Neshaminy Water Resources Authority

STATEMENT OF FINDINGS

MEP-8-80-134-3

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

1. Name of Applicant: Neshaminy Water Resources Authority
2875 Old York Road
P. O. Box 378
Jamison, Pennsylvania

2. Project Description, Location, Character and Purpose of the Proposed Activity:

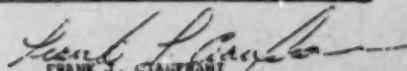
General Overview of the Overall Point Pleasant Water Diversion

The proposed Point Pleasant Water Diversion is an integral component of the Neshaminy Water Supply System that is being implemented by the Neshaminy Water Resources Authority of Bucks County. This system would divert water from the Delaware River mainstem at Point Pleasant to (1) supplement public water supplies in Bucks and Montgomery Counties, and (2) provide water, when needed, to the Libby's Generating Station in Montgomery County.

The Point Pleasant Pumping Station would have an ultimate capacity to divert approximately 95 million gallons per day (mgd) of water and lift the water via a transmission main some 2.4 miles to the proposed Bradshaw Reservoir. The Bradshaw Reservoir would serve as a holding and control structure.

In the second segment, the water diverted from Bradshaw Reservoir to the Neshaminy Water Resources Authority water supply system would be released into a transmission main approximately one mile long to the North Branch of Neshaminy Creek, and then flow by gravity into and through Lake Galena to the North Branch water treatment plant located in Chalfont, Pennsylvania. After treatment to meet Federal and State drinking water standards, water would be distributed through several transmission mains to serve public water supply systems in Bucks and Montgomery Counties serving over 50 municipalities. These transmission facilities would be constructed and operated by NWRA. A maximum of approximately 49 mgd of water will be diverted for potable water augmentation.

Certified a true and correct copy of Records of the Corps of Engineers,
Philadelphia District.


FRANK J. CIANFRANI
Acting Chief, Permits Branch

A-114

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NAPOP-R

SUBJECT: Application by Lehigh Valley Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

In the third segment, a maximum of 66 mgd would be pumped from the Bradshaw Reservoir via a transmission line some 6.7 miles to the East Branch Perkiomen Creek. Water released to the upper reaches of the East Branch Perkiomen Creek would flow by gravity in the stream channel to a diversion point near Graterford on the Perkiomen Creek, and thence via a transmission main to the Limerick Generating Station. This segment, including Bradshaw Reservoir, transfer facilities to Perkiomen Creek, and pumping facilities from Perkiomen Creek to Limerick, would be developed and operated by the Philadelphia Electric Company.

The extent of the Corps of Engineers regulatory jurisdiction/evaluation over pipeline projects is limited to those portions of the overall project involving stream crossings, intake structures and/or adjacent wetland crossings. Accordingly, Philadelphia District has reviewed the overall water diversion system and determined that the proposed intake structure/pipeline in the Delaware River and under the Delaware Canal (NAPOP-R-80-534-3), and the proposed relocation of Pine Run Creek at the North Branch treatment plant (NAPOP-R-80-813-3), requires processing of individual Department of the Army permit applications. All other stream crossings and other construction associated with the project are either not within the Corps regulatory jurisdiction, or are subject to existing Department of the Army nationwide permits and therefore do not require processing of individual Department of the Army permit applications (see Incl 1).

This Statement of Findings encompasses the proposed construction of the intake structure/pipeline in the Delaware River and under the Delaware Canal, hereafter referred to as proposed work NAPOP-R-80-534-3 (Incl 2). The proposed relocation of Pine Run Creek will be addressed in a separate Statement of Findings (NAPOP-R-80-813-3).

The Point Pleasant Water Diversion Project is within the jurisdiction of the Delaware River Basin Commission, a Federal/interstate agency having responsibility pursuant to the National Environmental Policy Act of 1969. Accordingly, the Delaware River Basin Commission (DREC) has performed an extensive evaluation of the proposed water diversion system. As the lead Federal permitting agency, the Delaware River Basin Commission has prepared a Final Environmental Impact Statement (1973) and an updated Environmental Assessment (August 1980). The Delaware River Basin Commission is an agency representing the views of the Commonwealth of Pennsylvania, the State of Delaware, the State of New Jersey, the State of New York, and the Federal

p. 115

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NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

government. The Corps of Engineers in making its evaluation of the Department of the Army permit application has relied, in part, on the information, data and conclusions of the Delaware River Basin Commission.

b. Location: The project site is located on the west bank of the Delaware River approximately 0.3 mile downstream of the village of Point Pleasant in Plumstead Township, Bucks County, Pennsylvania.

c. Character: The project plans provide for constructing a water intake structure consisting of 40" diameter cylindrical wedge wire screens and support piping that would be located off the bottom of the Delaware River, approximately 245 feet channelward from the River bank at normal water level. The plans provide for placement of about 240 square yards of riprap at the base of the intake screens to prevent scouring. The plans also provide for constructing three conduits, each measuring 42 inches in diameter and about 300 feet in length that would be buried below the bed of the River and would connect to the proposed water intake structure. The plans also provide for excavating approximately 4000 cubic yards of materials by dragline method during the excavation operations. After the three conduits and support piping foundations are installed, the excavated area would be backfilled with suitable material to pre-existing bottom elevations. The plans also provide for installing about 390 linear feet of 72" diameter conduit at a minimum depth of 24 feet below the bed of the Pennsylvania Canal. Temporary earthen cofferdam would be utilized across the canal during the construction and trenching of the proposed 72" diameter conduit crossing under the canal. After the conduit is installed, the trench would be backfilled with suitable material to pre-existing canal bottom contours.

d. Purpose: The applicant's stated purpose for the proposed project is to supply treated potable water serving central portions of Bucks and Montgomery Counties, Pennsylvania, and to provide water, when needed, to the Limerick Generating Station in Montgomery County, Pennsylvania.

3. Corps of Engineers Regulatory Authority: Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act (33 USC 403 and 33 USC 1344).

NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

4. Summary of Prior Reviews and Evaluations of the Entire Point Pleasant Water Diversion System:

The information contained in this section was obtained, in part, from the Pennsylvania Department of Environmental Resources. The purpose of this section is to provide a brief history and indicate the extent of prior reviews and evaluation of the overall Point Pleasant Water Diversion System.

The Point Pleasant Water Diversion Project has been the subject of many reviews, evaluations, studies and assessments over a period of nearly twenty years. The following is a partial listing of prior reviews, evaluations and approvals by the Delaware River Basin Commission, State and County authorities and Federal Courts.

The basic Point Pleasant Water Supply System resulted from the 1966 Water Resources Study - Neshaminy Creek Basin, Pennsylvania (Pennsylvania Water Resources Bulletin No. 2), a report prepared jointly by the Pennsylvania Department of Forests and Waters (now Department of Environmental Resources), the Soil Conservation Service of the U. S. Department of Agriculture, and Bucks and Montgomery Counties.

The fundamental watershed system for Neshaminy Creek was approved by the Delaware River Basin Commission and added to the Delaware River Basin Comprehensive Plan on 26 October 1966, in Neshaminy Creek Watershed Project, Bucks and Montgomery Counties, Pa. DRBC Docket No. D-65-76 CP. This decision was supplemented by Bucks and Montgomery County Commissioners, Neshaminy Creek Watershed Project, Bucks and Montgomery Counties, Pa. DRBC Docket No. D-65-76 CP(2) (25 January 1967). The supplemental docket incorporated the entire multipurpose project as described in the 1966 Water Resources Study to the DRBC Comprehensive Plan.

In 1970, Bucks County prepared and submitted the Feasibility Study of Delaware River Pumping Facilities at Point Pleasant, Pennsylvania, which assessed the proposed design of the Point Pleasant diversion facilities to provide public water supply in Bucks and Montgomery Counties, together with water quality augmentation for the Neshaminy Creek.

NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

The Pennsylvania Water and Power Resources Board, on 8 December 1970, issued to Bucks County a Water Allocation Permit No. WA-649, authorizing the withdrawal of Delaware River water for public water supply.

5. On 17 March 1971, the Delaware River Basin Commission approved the plan in a document labeled Commissioners of Bucks County, Point Pleasant Pumping Station, Bucks County, Pa., DRBC Docket No. D-65-76 CP(3). This docket added the proposed project to DRBC's Comprehensive Plan, but deferred approval pursuant to Section 3.8 of the DRBC Compact until submission of final plans. The facilities included were a pumping station at Point Pleasant with the capacity and layout to handle all the required pumpage of the Delaware River water to the Neshaminy Basin, plus the proposed pumpage into the Perkiomen Creek Basin. As part of the 1971 docket review, Delaware River Basin Commission prepared and processed a draft Environmental Impact Statement for the system in accordance with the National Environmental Policy Act, entitled "Financial Statement - Environmental Impact of the Proposed Point Pleasant Diversion Plan, Bucks and Montgomery Counties, Pennsylvania". In February 1973, the Delaware River Basin Commission prepared and submitted to the Council on Environmental Quality an expanded Final Environmental Impact Statement on the Point Pleasant Water Diversion System.

In September of 1978, the Neshaminy Water Resources Authority filed an application with the Pennsylvania Department of Environmental Resources for a reduced water allocation permit for public water supply. After an extensive evaluation, summarized in the Report on the Application of the Neshaminy Water Resources Authority for Water Allocation from Pine Run, North Branch Neshaminy Creek, and Delaware River, (1 November 1978), ("DER Water Allocation Report"), the Pennsylvania Department of Environmental Resources approved Water Allocation Permit No. WA-0978601, which superseded and replaced the permit No. WA-649 previously issued on 8 December 1970, by the Pennsylvania Water and Power Resources Board.

In addition to providing treated water supply to Central Bucks and Montgomery Counties, the proposed Point Pleasant Water Diversion System will withdraw Delaware River water for transfer via Perkiomen Creek to be used by the Philadelphia Electric Company (PECO) for cooling purposes at its Limerick Generating Station located along the Schuylkill River near Pottstown, Pennsylvania.

NAPOP-R

SUBJECT: Application by Weshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

DRBC Docket No. D-65-76 CP(3) (17 March 1971) (referenced above), added the Perkomen transfer element for Limerick to the overall Point Pleasant Weshaminy project. As noted above, a Final Environmental Impact Statement on the Point Pleasant Diversion Plan, covering both the public water supply and Limerick transfers, was prepared by DRBC and filed with the Council on Environmental Quality in February 1973.

The Delaware River Basin Commission subsequently approved the water supply features of the system to the Limerick Generating Station subject to a specific list of conditions (Delaware River Basin Commission Docket No. D-69-210 CP, 29 March 1973) (Incl 3).

In November 1973, the U. S. Atomic Energy Commission's Directorate of Licensing completed the Final Environmental Statement related to the Proposed Limerick Generating Station, Units 1 and 2, Philadelphia Electric Company. Based on this EIS, the previous EIS prepared by Delaware River Basin Commission (DRBC), and the record compiled at hearings before the Atomic Safety and Licensing Board and the Appeal Board of the Nuclear Regulatory Commission (NRC), the NRC issued to Philadelphia Electric Company construction permits for the Limerick plant in March 1975. A decision was rendered by the Atomic Safety and Licensing Appeal Board. In the Matter of Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 and 50-353 (19 March 1975). The decision specifically addressed numerous contentions made by intervenors in the AEC/NRC proceedings concerning the adequacy of the final EIS prepared in 1973 by the Atomic Energy Commission. Based on the AEC Final EIS and DRBC's own EIS of 1973, DRBC issued Docket approval No. D-69-210 CP (5 November 1975) for the construction of Limerick's water supply facilities (Incl 4).

Delaware River Basin Commission (DRBC) Docket No. D-69-210 CP included the Limerick project in the DRBC Comprehensive Plan. The docket further gave Section 3.8 approval for construction of the Limerick Station, together with the Schuylkill River and Perkomen Creek intake and diversion structures. Meanwhile, the Atomic Safety and Licensing Appeal Board's decision, and NRC's issuance of construction permits for Limerick, were appealed to the Third Circuit Federal Court of Appeals by the project's opponents. The appellants challenged the adequacy of the environmental impact statements relied on by the NRC, both the EIS prepared by the Atomic Energy Commission and that prepared by DRBC in February 1973. In particular, appellants charged that the previous environmental impact statements had not properly

MAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

assessed the impacts of water supply elements of the Limerick project, including the Point Pleasant diversion.

The Third Circuit's decision on the appeal was rendered in Environmental Coalition of Nuclear Power, Limerick Ecology Action, and Delaware Valley Committee for Protection of the Environment v. Nuclear Regulatory Commission and Philadelphia Electric Company, No. 75-1421 (12 November 1975). The Court of Appeals rejected the challenges to the environmental impact statements and found the previous environmental assessments prepared by DRBC and the NRC adequate to satisfy the purposes of National Environmental Policy Act of 1968 (NEPA). The Third Circuit's decision and order were not appealed to the U. S. Supreme Court.

The combined project again came before Delaware River Basin Commission in proceedings commencing in 1979. On 27 January 1979, PECO filed with DRBC an application pursuant to Section 3.8 of the Compact for approval of the construction of its portions of the Point Pleasant pumping station, Bradshaw Reservoir, and transmission lines to the Perkiomen Creek.

On 5 July 1979, M&RA filed application pursuant to Section 3.8 of the Compact for approval of construction of its portions of the Point Pleasant pumping station, the water treatment plant at Chalfont and the various transmission lines. Both Section 3.8 applications were supported by detailed "environmental reports," prepared by the applicants as required by the then applicable DRBC Regulations 18 C.F.R. Section 401.51-401.53 (1977).

In August 1980, the DRBC prepared and published a "Final Environmental Assessment for the Neshaminy Water Supply System" project sponsored by M&RA and PECO. The Executive Director of the Delaware River Basin Commission, on the basis of the environmental assessment, recommended that a new EIS not be prepared based on his conclusion that the proposed projects would have no significant adverse impacts on the human environment. On 18 February 1981, DRBC approved the Section 3.8 applications of both PECO and M&RA (Incl 5). The construction details of the project were added to the Comprehensive Plan.

These actions by Delaware River Basin Commission were the subject of appeals filed before the U. S. District Court, Eastern District of Pennsylvania, in the matter of Delaware Water Emergency Group, et. al., v. Gerald M. Mansler, et. al., Civil Action No. 80-4372, 17 August 1981. The primary issue before

NAPCP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 7812 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

the court was whether DRBC had fully and fairly considered the environmental impacts of the proposed project with particular emphasis on impacts upon basin water resources.

In rendering its decision, the District Court rejected the allegations and concluded:

"The record in this case makes four matters quite obvious. First, there have been at least three prior EIS's on the basic plan and concept, all of which were available and considered by DRBC. With the Level B study, there have been at least four EIS's prepared. Second, the project has been under constant study and updating of factual information from the plans inception to the present time, and indeed is subject to ongoing studies. Third, the only substantial change from heretofore approved plans based on prior environmental impact statements and other studies is a substantial reduction in the quantity of water to be withdrawn for NWRA's water treatment plant. Fourth, the environmental assessment prepared is detailed, up-to-date and adequately considers any changed circumstances."

This Court decision was affirmed by the Third U. S. Circuit Court of Appeals on 19 March 1982.

6. Date of Public Notice or Public Hearing and Summary of Comments:

a. Date of Public Notice: All known interested parties were notified of the proposal by Public Notices NAPCP-R-80-534-3 dated 4 April 1981 (Incl 6) and NAPCP-R-80-534-3-Supplement Number 1 dated 9 February 1982 (Incl 7).

b. Public Hearing: Notification for a Corps of Engineers public hearing was issued on 10 August 1981, NAPCP-R-80-534-3-HRG (Incl 8). A public hearing was conducted on Tuesday, 15 September 1981 at the Bucks County Community College, Newtown Township, Pennsylvania. A record of the public hearing was prepared (Incl 9) and notice of its availability was published on 11 January 1982 (Incl 10).

NAPDP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

c. Summary of Public Comments: More than 300 letters have been received in response to the proposed project (Incl 11). The primary concerns expressed are as follows:

- (1) Impact of water withdrawal on salinity intrusion.
- (2) Impact of water withdrawal on water quality.
- (3) Impact of water withdrawal on aquifer recharge.
- (4) Impact of water withdrawal on impingement and entrainment.
- (5) Impact of water withdrawal on fish and wildlife resources.
- (6) Consumptive use of water.
- (7) Impact of blasting on surrounding community.
- (8) Impact on aesthetics.
- (9) Impact on wetlands.
- (10) Impact on navigation.
- (11) Impact on historic resources.
- (12) Impact on air quality.
- (13) Impact on noise levels.

Many of these issues have been evaluated and addressed by the Delaware River Basin Commission prior to their issuance of docket approval for the project. Where appropriate, the Corps has relied on the expertise of the DRBC with respect to certain construction and operational aspects of the project. Issues such as these directly related to water supply and/or water allocation are beyond the scope of jurisdiction of the Corps of Engineers and are the responsibility of the DRBC.

d. Summary of Federal and State Congressional Interests:

(1) Federal:

(a) Honorable James E. Coyne (Congressman, 8th Philadelphia District) - expressed interest in the overall project. Urged Corps to make a thorough and complete review of the project prior to making a final decision (Incl 12).

(b) Honorable Robert W. Edgar (Congressman, 7th Philadelphia District) - requested that the Corps of Engineers conduct a public hearing and expressed concern with respect to the project's impact on water quality, fish and wildlife, salinity intrusion and consumptive use of water. The Congressman requested that the Corps of Engineers prepare an Environmental

NAPOP-R

SUBJECT: Application by Meshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

Impact Statement (Incl 13).

(c) Honorable Charles F. Dougherty (Congressmen, 4th Philadelphia District) - forwarded copies of constituents letters (Incl 14).

(d) Honorable James J. Florio (Congressmen, 1st New Jersey District) - requested that the Corps of Engineers conduct a public hearing (Incl 15).

(2) State:

(a) Honorable James C. Greenwood (State Representative, Philadelphia District) - requested that the Corps of Engineers conduct a public hearing (Incl 16).

e. Summary of Other Federal Agency Comments:

(1) U. S. Environmental Protection Agency - In letters dated 5 May 1981 and 5 August 1982 stated that they have considered the potential pollution as well as other possible effects on the environment that may result from the project construction and have no objection to permit issuance provided the following conditions are met (Incl 17). These conditions will be made part of any permit issued for the proposed work:

(a) That a water quality certificate is issued by the Pennsylvania Department of Environmental Resources for the project.

(b) Flow velocities at the water intake shall be controlled to avoid impacts to aquatic life due to impingement on the intake screens

(c) Construction practices shall be restricted to prohibit any double handling of excavated or dredged materials in the waterway.

(d) Dredging and/or filling will be done so as to minimize disturbance of the bottom or turbidity increases in the water.

(e) Deposition of dredged or excavated materials on shore, and all earthwork operations on shore will be carried out in such a way as to minimize erosion of the material and preclude its entry into the waterway.

NAPOP-R

SUBJECT: Application by Mshaminy Water Resources Authority, 2675 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

(f) On completion of earthwork operations, all fills on shore, and other areas on shore disturbed during construction, will be seeded, rip-rapped or given some other type of protection from subsequent soil erosion.

(g) Applicant will employ measures during construction to prevent spills of fuels or lubricants. If a spill occurs, it will be controlled to prevent its entry into the waterway.

(2) National Oceanic and Atmospheric Administration: In a letter dated 30 August 1982, the National Marine Fisheries Service expressed no objection to issuance of a Department of the Army permit. The project would have no significant adverse impact on national marine fisheries resources (Incl 18).

Pursuant to Section 7 of the Endangered Species Act of 1973, formal consultation with the National Marine Fisheries Service was undertaken to determine the potential impact of the proposed work on the shortnose sturgeon in the Delaware River, a Federally listed endangered species. Accordingly, a biological assessment of the probable, potential impacts of the project was prepared and coordinated with National Marine Fisheries Service (Incl 19).

The National Marine Fisheries Service concluded in its biological opinion of 19 July 1982 that the construction and operation of the proposed intake structure would not likely jeopardize the continued existence of the endangered shortnose sturgeon in the Delaware River (Incl 20). In addition, National Marine Fisheries Service recommended that additional research and monitoring be performed to obtain site specific data on shortnose sturgeon occurrence and utilization of the project site.

(3) U. S. Department of the Interior, Fish and Wildlife Service - In letters dated 19 June 1981 and 26 March 1982, the USDOI contended that sufficient information concerning the projects potential impact on fish and wildlife resources was not available. The Service recommended that the Corps of Engineers perform an independent assessment of the cumulative impacts of the project, particularly with respect to dissolved oxygen and salinity intrusion. In response to the recommendations of USDOI, the District Engineer provided additional information on 18 February 1982 and 1 June 1982. The USDOI in letters dated 12 July 1982, 23 July 1982 and

NAPOD-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

3 August 1982 reiterated their previous comments and objected to the issuance of a Department of the Army permit (Incl 21).

(4) Advisory Council on Historic Preservation (ACHP):

The project site is in the area of the Delaware Canal, a National Landmark and a property listed in the National Register of Historic Places. In addition, the work site is within the Historic District of Point Pleasant, an area determined eligible for listing in the National Register of Historic Places by the USDOH, Keeper of the National Register (Incl 22). In accordance with National Historic Preservation Act, 16 USC 470 and regulations 36 CFR 800 extensive coordination/consultation with the ACHP and others was conducted. The formal consultation procedures have been concluded with the ACHP by the preparation and signing of a Memorandum of Agreement, outlining measures to protect historic resources and values of the area (Incl 23).

7. Views of State and Local Authorities:

a. State:

(1) The Pennsylvania Department of Environmental Resources has prepared a Detailed Environmental Assessment on the project and has issued their requisite Dams Safety and Encroachment Permits on 2 September 1982 (Incl 24). In addition a Water Quality certificate was issued on 2 September 1982 (Incl 25).

Under current Federal regulations issuance of a water quality certificate is considered conclusive with respect to water quality considerations. Furthermore, where officially adopted state land use classifications, determinations, or policies are applicable to the land or water areas under consideration, issuance of state approval(s) is presumed to reflect the local public interest.

(2) Pennsylvania Fish Commission in letters dated 4 May 1981 and 24 March 1982 (Incl 26) expressed concern with regard to the project's impact on fisheries resources of the Delaware River.

The Pennsylvania Fish Commission is a State agency having responsibility for providing comments and recommendations to the Pennsylvania Department of

NAFOP-R

SUBJECT: Application by Neshominy Water Resources Authority, 2375 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

Environmental Resources in their permit application review process. The permit decision(s) of the Pennsylvania Department of Environmental Resources reflects the final consolidated position of the Commonwealth concerning the project's potential impacts, including fishery resources.

(3) Pennsylvania State Historic Preservation Office (SHPO) - The project site is in the area of the Delaware Canal, a National Landmark and a property listed in the National Register of Historic Places. In addition, the work site lies with the Historic District of Point Pleasant, an area determined eligible for listing in the National Register of Historic Places by the USDOH, Keeper of the National Register (Incl 22). In accordance with applicable Federal regulations, extensive coordination/consultation with the SHPO and others was conducted. The formal consultation procedures have been concluded with the SHPO by the preparation and signing of a Memorandum of Agreement, outlining measures to protect historic resources and values of the area (Incl 23).

b. Local: Compliance with Plumstead Township, local building and zoning ordinances may be required (Incl 27).

B. Views of the District Engineer concerning probable effects of the proposed construction and operation of the intake structure on:

a. Navigation: No significant effect. The proposed pipeline crossing the Delaware Canal and extending into the Delaware River will be buried beneath the canal and river bottom with a minimum of four feet of cover. The only portion of the pipeline above the existing river bottom will be the intake screen assembly. This assembly will be located at a minimum depth of approximately 4 feet below the water surface at minimum river flow of 1400 - 1500 CFS. The Delaware River at the project location does not support commercial navigation. It does however, provide for some recreational boating, i.e.: small power boats, canoes, rafts and inner tubes. Even though the proposed 4 foot depth of water over the intake screens is considered to be adequate for navigation, any permit issued will also include a condition requiring marking of the intake screen assembly to further safeguard boating in the area.

The water intake screens are periodically backwashed by releasing compressed air through the cylindrical screens. The air will then rise to the water surface. There will be some disturbance of the water surface due

NAPOP-R

SUBJECT: Application by Meshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

to this air backwash and precautions will be taken in the operating procedures to assure that the area is clear of water craft and people.

The air storage tank and all controls for operation of the backwash will be at the gate well. As an added precaution, the operator will only be able to operate the backwash controls from the top of the gate well. This location of the controls puts the operator near the River bank and about 17 feet above normal water level where he can observe the River, both upstream and downstream for some distance.

b. Harbor Lines: Not applicable.

c. Flood Heights, Drift and Flood Damage Protection: No significant impact. The project will involve the placement of permanent fill within the existing floodplain, however, the area of fill is extremely small (0.5 acres) in relation to the overall floodplain. The project has been designed to minimize impact on the floodplain.

d. Erosion or Accretion: No significant effect. All construction work will be performed in accordance with applicable soil erosion standards as set forth by the Pennsylvania Department of Environmental Resources. All areas disturbed during construction will be adequately stabilized against erosion.

e. Conservation: No significant effect. The construction will cause some short term adverse effects such as increases in noise, airborne dust and vehicular traffic in the area. Rock excavation and blasting during construction will have no significant effect on the surrounding environment. Construction of the pipeline beneath the Delaware River will result in some temporary turbidity. However, no permanent impact is expected since all trenches and disturbed areas will be returned to preconstruction elevation and condition. The construction of the pipeline will eliminate by filling approximately 0.22 acres of wetland vegetation. These wetlands are typical of floodplain forested areas in the vicinity. The wetland area to be impacted is not considered significant in either size or character. The project has been designed and will be constructed so as to minimize to the maximum extent

NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

practicable impact on existing aquatic/wetland habitat (see Incl 30, Environmental Assessment).

f. Fish & Wildlife: The project will result in the permanent loss by filling of approximately 0.22 acres of wetlands. The impact on these wetlands is not considered significant. All areas temporarily disturbed during construction will be restored to pre-project condition. The intake screens and pipes will be constructed during the months of November through March in order to avoid adverse impacts on aquatic life. Impact on fisheries from blasting will be minimized through the use of "scare charges" and small, slow burning charges. Operation of the intake structure as permitted by the Delaware River Basin Commission will result in no significant adverse impact on aquatic organisms through entrainment and impingement. The intake structure will be fitted with Johnson wedge wire screens designed to reduce, to the maximum extent possible, impacts of entrainment and impingement of aquatic life. The use of these screens represents the "State of the Art" technology with respect to intake structure design.

Withdrawal of water as permitted and regulated by the Delaware River Basin Commission will have no significant adverse impact on the Delaware River system. The project with conditions imposed by the DRBC will have no significant effect on salinity intrusion of well fields and surface water users of the Delaware River. Withdrawal of water, even during low flow conditions, will have a biologically insignificant effect on downstream dissolved oxygen concentrations (see District Environmental Assessment (Incl 30)).

Pursuant to Section 7 of the Endangered Species Act of 1973, a biological assessment of the project's potential impact on the endangered shortnose sturgeon was prepared and coordinated with the National Marine Fisheries Service (Incl 19). The National Marine Fisheries Service's Biological Opinion determined that the proposed construction and operation of the intake structure will have no significant effect on the shortnose sturgeon nor will it likely jeopardize their continued existence (Environmental Assessment (Incl 30) and Biological Opinion (Incl 20)).

g. Water Quality: The proposed construction should have no significant impact on water quality of the Delaware River. The project will be constructed in accordance with sound engineering practices minimizing potential impacts on the environment. There will be some turbidity during construction, (trenching, blasting, etc.). However, any associated adverse

NAPOP.R

SUBJECT: Application by Heshaminy Water Resources Authority, 2575 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

Impacts will be temporary in nature and will have no significant long term effect on the water quality of the River system.

Withdrawal of water as permitted and regulated by the Delaware River Basin Commission will have no significant effect on the water quality of the Delaware River System. The project with conditions imposed by the DRBC will have no significant effect on salinity intrusion and on downstream dissolved oxygen concentrations (see Environmental Assessment (Incl 30)).

In addition, the Commonwealth of Pennsylvania, in accordance with Section 401 of the Clean Water Act, has issued a water quality certificate for the Point Pleasant water diversion.

h. Aesthetics: No significant impact. Where possible all areas disturbed during construction will be restored to pre-project conditions. Permanent structures will be designed and built of materials so as to conform with the natural rural setting of the area. In addition, appropriate landscaping will be included to further minimize any aesthetic impact of the proposed work.

i. Historic Values: No significant effect. The project site is located within the Point Pleasant Historic District. As stated previously, the Historic District has been determined eligible for inclusion in the National Register of Historic Places by the U. S. Department of the Interior, Keeper of the National Register. In addition, the proposed project involves the pipeline crossing of the Pennsylvania/Delaware Canal, a National Landmark currently listed on the National Register of Historic Places.

It has been determined, in coordination with State Historic Preservation Office and Advisory Council on Historic Preservation, that the project as proposed will have a technical adverse effect on the Point Pleasant Historic District and on the Pennsylvania/Delaware Canal.

In accordance with 33 CFR 800, a Memorandum of Agreement has been adopted to protect to the maximum extent possible the historic values of the area (Incl 23).

NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

j. Recreation: No significant effect. See item 8(a) and (i).

k. Economy: During construction, the project will provide increased employment in the building trades. Realization of the project will provide additional potable water supply to portions of Bucks and Montgomery Counties. In addition, supplemental water will be provided to the Limerick Generating Station to augment cooling requirements for production of electric power for public consumption.

l. Water Supply: The purpose of the proposed project is to withdraw water from the Delaware River to supply treated potable water to portions of Bucks and Montgomery Counties and to the Limerick Generating Station for make up cooling water in the production of electric power. The diversion of water as permitted and regulated by the DRBC will have no significant adverse effects on existing water supplies and other water users (see Environmental Assessment (Incl 30)).

m. Energy Needs: There will be little or no effect on energy needs by virtue of the project construction itself. However, upon project completion, a portion of the water to be withdrawn will be supplied to the Limerick Generating Station to be used in the generation of electrical power for public consumption. Operation of the pumping facility will require some electric power consumption.

n. Land Use Classification and Coastal Zone Management Plan: The proposed intake structure and pump-house will be located within a relatively undeveloped area within Plumstead Township, zoned R1-residential. Prior to construction/operation of the project, Neshaminy Water Resources Authority must obtain any county or local approvals required by law for the work and structures.

The project site is not within the approved Pennsylvania Coastal Zone.

o. Blasting Impacts - No significant impact anticipated.

In DRBC's Final Environmental Assessment (August 1980), the section on rock blasting impacts concludes that the specifications proposed by MMRA's consultant (Mr. Robert H. Davis) are well within the criteria set by DRBC's consultant (Converse Ward Davis Dixon, Inc.) as outlined in the "Report on Evaluation of Rock Excavation and Impact of Blasting for the Proposed Point

NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

Pleasant Pumping Facilities, Point Pleasant, Pennsylvania" (20 May 1980) (Incl 28).

Revisions were made to the plans that Converse Ward Davis Dixon originally reviewed (i.e.: further extension of the intake into Delaware River). In letters to E. H. Bourquard Associates, Inc. dated 28 August 1981 and 4 February 1982 (Incl 29), Converse again stated that their original conclusions and recommendations were still valid, provided that blasting criteria specified in their 20 May 1980 report are followed. Converse also indicated that the nearby structures mentioned in their 20 May 1980 report, which would be adequately protected by the proposed blasting criteria, includes the Delaware Canal locks.

Neshaminy Water Resources Authority will perform all blasting in a controlled manner to assure that there is no damage to nearby structures. MWRA will take all necessary measures to protect sites of archeological or historical significance (Incl 23, MOA).

In addition, the effects of blasting have been thoroughly reviewed by the Pennsylvania Department of Environmental Resources and that agency has concluded that no significant effects would result by reason of blasting operations. See item 8 (f) for probable impact on fish and wildlife resources.

9. Other Pertinent Remarks:

a. The Delaware River Basin Commission and the Pennsylvania Department of Environmental Resources has evaluated the need for additional water supply to the Limerick Generating Station, Bucks and Montgomery Counties and has approved the Point Pleasant Water Diversion project. The approvals of DRBC and Pa.DER are considered conclusive with respect to the need for additional water. The construction of the proposed intake structure would provide the means for the water withdrawal.

In a recent preliminary decision, the Pennsylvania Public Utility Commission indicated that Limerick Unit 1 should proceed to completion of construction, but requested that PECO provide additional justification as to the necessity of completing Unit 2 according to current schedules. Whether development of Unit 2 will be completed on schedule, delayed, deferred or terminated remains undecided.

NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

Since the possibility exists that a second unit would eventually be constructed over the life of the project, sizing of the intake structure, conduits and transmissions mains to accommodate the water requirements of both units is in accordance with sound engineering practices. Construction as proposed in such capacity would avoid the need for later expansion of such facilities, or the need to install duplicate facilities.

b. Appropriate Alternatives: The DRBC, as the lead Federal Agency having particular expertise and jurisdiction with respect to water usage and allocation within the Delaware River Basin, has in its docket review evaluated alternate sources and methods of water supply. On 18 February 1981, DRBC issued its docket approval for the Point Pleasant Water Diversion System. The decision was sustained by the U. S. District Court for the Eastern District of Pennsylvania, Civil No. 80-4327, 17 August 1981; affirmed, U. S. Circuit Court of Appeals for the Third Circuit, No. 81-2622, March 1982.

Accordingly, the Corps of Engineers' evaluation of the project alternatives is with respect to construction and operational impacts of the Delaware River intake only. It is considered unnecessary to conduct an in-depth evaluation of alternative supply sources notwithstanding the uncertainty regarding Limerick Unit No. 2. The Delaware River Basin Commission Docket, D-65-76CP(8) clearly establishes the need for the structure for Bucks County water supply. The need for the structure is independent of the Limerick water supply requirements. DRBC and Pa. DER have full authority to review this case at any time and to amend or withdraw their approvals if less water is needed. Issuance of a Corps permit for the intake will not usurp or impinge upon the authority of those local agencies.

The topographical configuration and present land uses of the area at and southwest of the Village of Point Pleasant are such that they do not offer a wide choice of sites for a major pumping installation. The northern portion of the Village, being more developed, would be an undesirable and costly location for an intake, pumping station and transmission pipeline. Also, locating the pump station in a more northerly location is precluded by the existence of archaeological sites. The southernmost portion is severely restricted by the lack of adequate level terrain due to the closeness of the bluff and State Route 32 to the river bank. Locating the pump station in a more southerly direction is further precluded by the existence of an archaeological site located southeast of the proposed intake conduit. In summary, once it was determined that the Point Pleasant area was the appropriate location for the withdrawal, the specific site selected

NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

for the pump station is virtually the only feasible one. Another major constraint is the location and effect of the Tohickon Creek. The combined Transmission Main should, if possible, be located south of the Tohickon Creek in order to avoid crossing a major stream in a deep rock valley. In addition, upon entering the Delaware River, the water from Tohickon Creek produces a significant change of flow velocity of the river with the accompanying turbulence and eddies. The effect of the eddies has been the build-up of a large sediment deposit in the river below the mouth of the Creek. The river intake should be located at some distance away from these alluvial deposits in order to avoid siltation at the intake entrance. The proposed intake alignment intercepts the actual river channel and thus the main river at about a right angle and approximately 300 feet downstream of the mouth of the Tohickon Creek. At this point, the river channel has returned to a more normal cross-section after having been restricted by the alluvial deposition below its confluence with the Tohickon Creek. The intake at this location had the additional advantages of minimal interference from loose surface ice, frazil ice and floating logs being drawn into the intake, and from silt and sand being deposited at the intake entrance.

An onshore traveling screen intake system aligned flush with the river bank was considered as an alternative to the presently proposed wedge-wire intake system. It was determined that a traveling screen system would adversely impact the aquatic environment by impingement and entrainment losses. The intake assembly as presently proposed minimizes any adverse environmental impacts.

c. Extent and Permanence of Beneficial and/or Detrimental Effects:

(1) Beneficial Effects - Realization of the project will provide increased availability of potable water to Bucks and Montgomery Counties. In addition, the project will provide additional water supply to the Limerick Generating Station to be used in the production of electric power for public consumption. See Item 8 (m) above.

(2) Detrimental Effects - No significant long-term impacts are anticipated (see item 8 (a) through (c)).

d. Probable Impact in Relation to Cumulative Effects Caused by Other Activities: Cumulative effects of other past and future water withdrawals have been previously evaluated by the Delaware River Basin Commission in their docket evaluation of the diversion system. The DBC has particular expertise and regulatory authority with respect to water allocation/usage

NAPOP-R

SUBJECT: Application by Meshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

within the basin. Any future water withdrawals, if any, will require the separate review and approval of the DRBC. Such future applications will be reviewed on their own merit in light of current conditions within the Delaware River Basin at the time of application. Construction of this project will have no significant adverse impacts (see Item 8 (a) through (c) and Environmental Assessment (Incl 30)).

10. A copy of the Corps of Engineers Environmental Assessment for this project is inclosed (Incl 30).

11. Determination of Compliance with the Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR, Part 230):

a. Determination of Potential Short Term and Long Term Effects of the Proposed Discharge of Fill Material:

(1) Physical Substrate: Construction of the proposed pump station and intake pipe will result in the permanent elimination of approximately 0.22 acres of existing wetland vegetation and will temporarily impact approximately 0.8 acres during construction. This wetland area has apparently originated and is currently maintained through water seepage from the adjacent Delaware Canal. This area is not directly connected to the Delaware River estuary and does not possess any unusual wetland characteristics. The site is typical of many floodplain forested areas in southern Pennsylvania. The most abundant plants in the tree size class are green ash, silver maple, sycamore, box-elder, and river birch. The shrub layer is dominated by spice bush while the ground cover consists of Japanese honeysuckle and purple loose-strife and bur-cucumber in the wetter areas.

While the project will result in some wetland loss (0.22 acres), the loss is not considered to be significant and represents an unavoidable impact. Wetland alteration has been reduced to the minimum practicable and any areas disturbed during construction (not permanently filled) shall be restored to their pre-construction condition (approximately 0.23 acres).

(2) Water Circulation/Fluctuation: The proposed discharge of fill material will have no significant effect on flood storage capacity of the area.

(3) Suspended Particulate/Turbidity: No significant effect anticipated. There will be an increase in turbidity during construction of the project. However, any adverse effects will be temporary in nature.

NAPOP-R

SUBJECT: Application by Meshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

Construction will be performed during the months of November through March and will be performed in accordance with sound construction practices and procedures to minimize any adverse impacts on the existing environment.

(4) Contaminant Availability: No significant effect.

(5) Aquatic Ecosystem Structure and Function: No significant effect (see item 11 (a)(1) above).

(6) Proposed Dredged Disposal Site: Not applicable.

(7) Cumulative Impact on the Aquatic Ecosystem by the Proposed Filling Operation: While the construction of the proposed work will eliminate approximately 0.22 acres of wetlands habitat through filling, this impact is not considered significant to the overall ecosystem of the area (see item 8 (f, g) and item 11 (a)(1)). Any future permit applications involving filling of special aquatic sites would be evaluated on their merits in accordance with applicable Federal regulations and guidelines in force at the time of application. Issuance of a permit for the proposed project would not, in itself, require issuance of approvals for other similar projects proposed in the future.

(8) Secondary Impacts on the Aquatic Ecosystems as a result of the Discharge of Fill Material: No effect other than those specified in this report.

b. Determination of Compliance with Guidelines:

(1) Water Dependency - The proposed project by its very nature is considered to be a water dependent activity. That is, the activity associated with the discharge of fill material (intake structure and conduit) must be located or sited in or in close proximity to the Delaware River in order to fulfill its basic purpose.

(2) Alternatives to the Proposed Discharge of Fill Material: See item 9 (b) above. The proposed project has been designed and will be constructed in a manner as to minimize to the maximum extent practicable, adverse impacts on the aquatic environment. Upon completion of the work, all areas disturbed during construction will be restored as closely as possible to their pre-construction condition. On balance, it is considered

NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2675 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

that the project, as proposed, represents the least environmentally damaging practicable and reasonable alternative available to the proponents of the project.

(3) The proposed discharge will not violate applicable State water quality standards or toxic effluent standards or prohibition, jeopardize the existence of Federally listed endangered or threatened species or their habitat or violate the requirements of any Federally designated marine sanctuary.

12. Findings: Based on the information and data available, it has been found that the work proposed in Department of the Army permit application NAPOP-R-80-534-3 is consistent with current Federal regulations (33 CFR 320 et seq.) and is in conformance with Federal guidelines (40 CFR 230). The project has been designed and the work will be performed in accordance with sound engineering principles and procedures so as to minimize to the maximum extent practicable any adverse impact on the surrounding environment.

There is a definite need for the project as demonstrated by the issuance of Delaware River Basin Commission Docket approval, and Pennsylvania Department of Environmental Resources permits.

After a complete review and evaluation of all available pertinent information, including comments, reports, and studies submitted by the public, it has been determined that the proposed work would not result in any significant adverse impacts to the environment and that the project design is consistent with the national concern for both protection and utilization of important resources.

On balance, it has been determined that the proposed work is not contrary to the general public interest and that the public interest would best be served by issuance of a Department of the Army permit.

13. Conclusion: It has been determined that a Department of the Army permit should be issued for the work described in Department of the Army permit application NAPOP-R-80-534-3 with the following special conditions:

a. That the pipeline crossing of the Delaware/Pennsylvania Canal and the construction of the intake structure in the Delaware River shall be

NAPOP-R

SUBJECT: Application by Meshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

performed in accordance with the methods and procedures specified in the attached document entitled "General Construction Procedures".

b. That in order to minimize and/or mitigate adverse impacts on archaeological and historic resources and values, the proposed construction work shall be performed in accordance with the conditions, specifications and procedures set forth in the attached "Memorandum of Agreement" and references thereto.

c. That all proposed construction/excavation and maintenance work in the Delaware River shall be performed during the months of November through March.

d. That all required blasting in the Delaware River and Delaware/Pennsylvania Canal shall be performed in accordance with the special requirements and practices set forth by the Pennsylvania Department of Environmental Resources in their Environmental Assessment and Findings, Point Pleasant Water Supply Project, Appendix B, attached.

e. That all areas disturbed during construction shall be stabilized to prevent soil erosion into adjacent waterways and wetland areas.

f. That dredged and/or excavated material shall not be stockpiled or rehandled in the waterways or on any adjacent wetland areas. Construction equipment and/or materials shall not be stored in any wetland areas.

g. That all dredging, excavation and filling shall be performed in such a manner so as to minimize turbidity increases in the Delaware River.

h. That the deposition of dredged and/or excavated materials on shore and all earthwork operations on shore shall be performed in such a manner so as to minimize erosion of material and preclude its entry into the waterways or adjacent wetlands.

i. That the permittee shall employ measures during construction to prevent spills of fuels or lubricants. If a spill occurs, it shall be controlled to prevent its entry into the waterways.

j. That all wetland areas temporarily disturbed during construction (approximately 0.8 acres) shall be restored to their preconstruction elevations and condition. During restoration work, suitable stabilization to prevent soil erosion shall be performed.

NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

k. That the intake screens and assembly in the Delaware River shall be suitably marked and/or lighted in accordance with U.S. Coast Guard rules and regulations.

l. The permittee shall develop and undertake a research and monitoring program to obtain site specific data on shortnose sturgeon occurrence in and utilization of the project area. The program shall be prepared in coordination with the Corps of Engineers and the National Marine Fisheries Service.

ROGER L. BALDWIN
Lieutenant Colonel, Corps of Engineers
District Engineer

Statement of Findings
List of Inclosures

- Incl 1 - District ltr. dtd 28 October 1980
ltr. dtd. 8 September 1980 from E.H. Bourguard, Assoc.
- Incl 2 - Application Package NADOP-R-80-534-3
- Incl 3 - DRBC Docket No. D-69-210CP - 29 May 1973
- Incl 4 - DRBC Docket No. D-69-210CP - 5 Nov. 1975
- Incl 5 - DRBC Docket No. G-79-52CP and Docket No. G-79-76CP (P) (DCC & MRA)
18 February 1981
- Incl 6 - District P.N. NADOP-R-80-534-3 dtd. 6 April 1981
- Incl 7 - District P.N. NADOP-R-80-534-3 Supplement Number 1 dtd. 9 Feb. 82
- Incl 8 - District Notice of Public Hearing NADOP-R-80-534-3-PHG dtd. 10 Aug. 81
- Incl 9 - District Public Hearing Record
- Incl 10 - District P.N. NADOP-R-80-0534-3 dtd. 11 Jan 1982
- Incl 11 - Responses to District Public Notices (approximately 200-350 ltrs)
- Incl 12 - Written correspondence from Congressman James E. Coyne:
District Letter dated 15 October 1982
Letter dated 23 September 1982 from James E. Coyne w/incl
District letter dated 20 May 1982
Letter dated 8 May 1982 from James E. Coyne
District letter dated 10 November 1981
Letter dated 2 November 1981 from James E. Coyne w/incl
District letter dated 27 August 1981
District letter dated 19 August 1981 w/incl
Letter dated 18 August 1982 from James E. Coyne w/incl
District letter dated 31 July 1981
District letter dated 9 July 1981
District letter dated 14 May 1981
Letter dated 5 May 1981 from James E. Coyne w/incl
- Incl 13 - Written Correspondence from Congressman Robert W. Edgar:
District letter dated 19 April 1982
Letter dated 2 April 1982 from Robert W. Edgar
District letter dated 1 March 1982 w/incl
District letter dated 23 October 1981
Letter dated 7 October 1981 from Robert W. Edgar
Letter dated 27 August 1981 from Robert W. Edgar
District letter dated 19 August 1981
District letter dated 5 August 1981 w/incl

~~Incl 14~~ - Written Correspondence from Congressman Charles F. Dougherty:

District letter dated 8 February 1982
Letter dated 15 January 1982 from Charles F. Dougherty w/incl

Incl 15 - Written Correspondence from Congressman James F. Florio:

District letter dated 19 August 1981 w/incl
District letter dated 20 July 1981 w/incl
Letter dated 30 June 1981 from James J. Florio

Incl 16 - Written Correspondence from Representative James G. Greenwood:

Letter dated 17 September 1982 from James G. Greenwood
Letter dated 28 April 1981 from James G. Greenwood

Incl 17 - Written Correspondence received from U.S. Environmental Protection Agency (Region III):

Letter dated 5 August 1982 from EPA w/incl
Letter dated 17 March 1982 from EPA w/incl
District letter dated 18 February 1982
District letter dated 11 May 1981 w/incl
Letter dated 5 May 1981 from EPA w/incl

Incl 18 - Written Correspondence from National Oceanic and Atmospheric Administration (National Marine Fisheries Service):

Letter dated 30 August 1982 from NOAA w/incl
Letter dated 19 July 1982 from NOAA w/incl
District letter dated 18 February 1982
Letter dated 8 June 1981 from NOAA

Incl 19 - Biological Assessment (Endangered Species):


District letter dated 12 February 1982 w/incl

Incl 20 - Biological Opinion (Endangered Species):

Letter dated 30 September 1982 from NOAA
Letter dated 19 July 1982 from NOAA w/incl

Incl 21 - Written Correspondence from U.S.D.O.I. (Fish & Wildlife Service):

Letter dated 18 October 1982 from U.S. Fish & Wildlife Service
District Letter dated 24 September 1982
Letter dated 14 September 1982 from U.S. Fish & Wildlife Service
Letter dated 3 August 1982 from U.S. Fish & Wildlife Service
Letter dated 23 July 1982 from U.S. Fish & Wildlife Service
Teletype from U.S. Fish & Wildlife Service
Letter dated 12 July 1982 from U.S. Fish & Wildlife Service
District letter dated 1 June 1982
District letter dated 9 April 1982
Letter dated 25 March 1982 from U.S. Fish & Wildlife Service


District letter dated 18 February 1982
Letter dated 22 January 1982 from Hershel J. Richman w/incl
District letter dated 23 October 1981
District letter dated 2 July 1981 w/incl
Letter dated 19 June 1981 from U.S. Fish & Wildlife Service
Letter dated 22 April 1982 from U.S. Fish & Wildlife Service

Incl 22 - Letter dated 29 December 1981 from U.S. Department of the Interior - Keeper of the National Register w/incl

Incl 23 - Memorandum of Agreement (Historic and Archeological Resources):

Letter dated 13 October 1982 from ACHP w/incl
Letter dated 24 September 1982 from ACHP
District letter dated 9 September 1982 w/incl (H.O.A.)

Incl 24 - Penna. Department of Environmental Resources - Dams Safety and Encroachment permits (4) dated 2 September 1982

PA. D.E.R. - Environmental Assessment and Findings, Point Pleasant Water Supply Project, August 1982

Incl 25 - Letter dated 2 September 1982 from PA. Department of Environmental Resources (Water Quality Certificate)

Incl 26 - Letter dated 24 March 1982 From PA. Fish Commission
Letter dated 4 May 1981 from PA. Fish Commission

Incl 27 - Letter dated 25 November 1981 from Mr. George M. Bush, on behalf of Plumstead Township.

Incl 28 - "Report on Evaluation of Rock Evaluation and Impact of Blasting for the Proposed Point Pleasant Pumping Facilities, Point Pleasant Penna." by Converse Ward Davis Dixon dated 20 May 1980.

Incl 29 - Letter dated 4 February 1982 and 28 August 1981 from Converse Ward Davis Dixon w/incls

Incl 30 - District Environmental Assessment

References: See District Environmental Assessment.
Permit application file NAPOP-R-80-534-3

NAPOP-R-20-0534-3

MEDIMAHY WATER RESOURCES AUTHORITY
POINT PLEASANT DIVERSION PROJECT
POINT PLEASANT, BUCKS COUNTY, PENNSYLVANIA
ENVIRONMENTAL ASSESSMENT

The above Authority has applied for a Department of the Army permit to build and operate a water intake structure in the Delaware River at Point Pleasant about 800 feet downstream of the mouth of the Tohickon Creek. The details of the project are contained in the attached Public Notice dated 6 April 1981, as amended 9 February 1982. We have made this assessment in accordance with the National Environmental Policy Act of 1969, (42 USC 4321 et seq.), Corps of Engineers Policy and Procedures for Implementing NEPA, (33 CFR 230), and Council on Environmental Quality Regulations, (40 CFR 1500 et seq.).

1. Documents

The Point Pleasant Project has been extensively documented. In preparing this assessment we have reviewed and analyzed that lengthy record, and we have drawn upon papers prepared by other Federal or state agencies, or their contractors. The record includes but is not limited to the documents, both pro and con, listed in chronological order below.

Advisory Council on Historic Preservation, Memorandum of Agreement.

September 1982.

Philadelphia Electric Company, Applicant's Responses to Interrogatories of Del-Aware Unlimited, Inc., (Nuclear Regulatory Commission), 20 August 1982.

Pennsylvania Department of Environmental Resources, Environmental Assessment of the Point Pleasant Project, August 1982.

U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Biological Opinion, 19 July 1982.

Phillippe, J. T., MS, PE, LS, CKY & Associates, Inc. - Letter, re: Point Pleasant Pumping Station, 10 May 1982.

Mince, Elizabeth R. - Preliminary Case Report ... Point Pleasant Diversion Project, 19 March 1982.

Van Arsdale, Judge Donald W. - Opinion, Delaware Water Emergency Group, et al. v. Mansler, et al., U. S. D. C., ED. Pa., Civil Action No. 80-4372, 17 August 1981, affirmed, CA 3, _____ F 2d _____, 19 March 1982.

Brundage, Harold, Ichthyological Associates, Inc. - Assessment of the Impacts of the Proposed Point Pleasant Pumping Station and Intake on the Shortnose Sturgeon, January 1982.

E. W. Bourquard Associates, Inc., NWRA - Revisions of Application No. NAPOF-E-80-0534-3, January 1982.

Auerbach, Kathryn Ann, Bucks County Conservancy - Comments, Point Pleasant Historic and Archaeological District, November 1981.

U. S. Army Corps of Engineers, Public Hearing Record of Permit Application by MWRA, 15 September 1981.

E. H. Bourquard Associates, Inc., MWRA - Point Pleasant Pumping Station - Location of Water Intake, August 1981.

Hintz, Elizabeth R. - Eligibility Determination Report for the Point Pleasant Historic District, 24 August 1981.

Borough of Morrisville, Objections and Questions of MWRA Permit Applications, July 1981.

Del-AMARE Unlimited, Inc. - Objections and Questions of MWRA Permit Applications, July 1981 (a).

Del-AMARE Unlimited, Inc. - Water Quality Exhibit, Section 8, July 1981 (b).

Betz-Converse-Murdoch, Inc. - Environmental Assessment and Section 404 Analysis of Point Pleasant Diversion Project, January 1981.

Delaware River Basin Commission - Salinity and Point Pleasant Diversion, December 1980.

Delaware River Basin Commission - Transcript of Public Hearing of MWRA and PECO, November 1980.

Radiation Management Corporation - Ecological Division - Vegetation of the Point Pleasant Intake Site, November 1980 (a).

Radiation Management Corporation - Ecological Division - Biological Evaluation of the Proposed Water Intake in the Delaware River at Point Pleasant, Pennsylvania, November 1980 (b).

Delaware River Basin Commission - Final Environmental Assessment for the Neshaminy Water Supply System, August 1980.

Converse Ward Davis Dixon, Inc. - Report on Evaluation of Rock Excavation and Impact of Blasting for the Proposed Point Pleasant Pumping Facilities.

May 1980.

Neshaminy Water Resources Authority - Environmental Report on Neshaminy Water Supply System, February 1979.

Radiation Management Corporation - Ecological Division - Neshaminy Water Supply System, Environmental Report, Water Quality - Aquatic Biota, November 1978.

U. S. Department of Agriculture, Soil Conservation Service - FINAL ENVIRONMENTAL IMPACT STATEMENT, Neshaminy Creek Watershed, Bucks and Montgomery Counties, Pennsylvania, April 1976.

Ichthyological Associates, Inc. - An Ecological Survey of the Delaware River in the Vicinity of Point Pleasant, Pennsylvania, February 1974.

U. S. Atomic Energy Commission - FINAL ENVIRONMENTAL IMPACT STATEMENT, Related to the Proposed Limerick Generating Stations, Units 1 and 2, Philadelphia Electric Company, November 1973.

Delaware River Basin Commission - FINAL ENVIRONMENTAL IMPACT STATEMENT, Point Pleasant Diversion Plan, Bucks and Montgomery Counties, Pennsylvania, February 1973.

II. CONSULTATION

We have consulted with numerous agencies as listed below, and in addition, we held a Public Hearing on 13 September 1981 at Bucks County Community College, Newtown Township, Pennsylvania, attended by over 1,000 persons.

UNITED STATES

Environmental Protection Agency

Department of Interior, Fish and Wildlife Service

Department of Interior, National Park Service, Keeper of the National
Register

Advisory Council on Historic Preservation

Department of Commerce, National Oceanic and Atmospheric Administration,
National Marine Fisheries Service.

DELAWARE RIVER BASIN COMMISSION

COMMONWEALTH OF PENNSYLVANIA

Department of Environmental Resources

Pennsylvania Historical and Museum Commission (State Historic Preservation
Officer)

III. NEED FOR PROPOSED PROJECT

The need for a surface water supply (the entire Point Pleasant Diversion
System) has been explained fully by others, principally by the Delaware
River Basin Commission, the Federal-interstate agency having primary
responsibility, control, and expertise regarding use of water in the
Delaware Valley. DRBC has incorporated the Diversion Project into DRBC's

Comprehensive Plan, and has set forth its reasons in a Final Environmental Impact Statement (1973) and in a Final Environmental Assessment (1980).

Those actions by DRBC have received judicial approval, (see VanArtsdalen, Judge Donald W., in I. DOCUMENTS, above). The need for the entire Point Pleasant Project is therefore settled, and no longer an issue.

We are processing a permit application, not for the entire Diversion System, but only for a part thereof; that intake structure to be built in the Delaware River, and the conduit which is to pass under the Pennsylvania Canal. The need for the Diversion System having already been determined, the need for the intake structure and related piping is manifest; without those parts, the System cannot operate. The intake structure and piping as planned is the only practicable method for taking water from the River and pumping it into the System.

IV. ENVIRONMENTAL IMPACTS

General Construction Impacts -

Short-term adverse environmental impacts expected during construction will include an increase in background noise due to rock excavation by blasting and use of construction equipment. Air quality would be decreased during construction due to increased traffic and construction equipment. Traffic will be impaired on Route NO. 32 causing traffic delays and detours until construction is complete. Rock excavation by blasting can be controlled so

A-147

as to result in no noticeable damage to nearby structures or wells by blast-generated ground motion, airblasts and flyrock (Converse Ward Davis Dixon, 1980).

Canal Crossing Construction Impacts -

Installation of the intake conduit under the Canal will be accomplished in the dry. A temporary roadway and dike is proposed to be installed across the canal utilizing materials excavated from the site. An upstream weir will bypass the Canal flow into the Delaware River. Temporary pumping facilities are proposed to pump water from the Delaware River to the downstream side of the temporary dike to provide continual water supply to the Canal downstream of the construction site. This water will maintain the aquatic environment in the Canal at its present state.

Water between the dike and Lock No. 14 would be pumped to a sedimentation basin in order that sediments in the pumping process would not create excessive siltation in the Delaware River. During the pumpout process fish would be removed, as directed by the Pennsylvania Fish Commission, and either returned downstream or placed in the Delaware River. The trench will then be excavated and conduit installed. After installation is complete the surface of the excavated portion of the Canal will be shaped to original contours, and impervious soils from the trench excavation will be used for replacement of the Canal lining. The temporary dike would then be removed and water returned by opening Lock No. 14. The impacts to the aquatic environment in the Canal would be minimized using the bypassing technique described. A few fish can be expected to be injured or expire during

the removal process but the impact on the fish community as a whole would be minimal and short term. Proper sediment and erosion control measures would prevent materials from entering the Canal or Delaware River. After the Canal crossing is completed, the disturbed banks and bottom would have no long term visual disturbance.

Intake Construction Impacts -

Installation of intake conduit and gate well will be preceded by the staking of wetlands and the placement of hay bales to avoid wetlands disturbance.

The total area of affected wetlands is 0.30 acres, which is about one-third of the 0.93 acre of wetlands on the site (E. H. Bourquard Associates, Inc., 1982). The wetlands are typical of many floodplains forests in southeastern Pennsylvania. The most abundant plants in the tree size class are green ash, silver maple, sycamore, box-elder, and river birch. The shrub layer is dominated by spice bush while the ground cover consists of Japanese honeysuckle, purple loosestrife and bur-cucumber in the wetter areas (RMC, 1980), of this, 0.22 acre of wetlands will be permanently destroyed by the placement of fill. The applicant has revised the plans (E. H. Bourquard Associates, Inc., 1982) to minimize wetlands lost to the smallest acreage practicable. The remaining 0.08 acres of wetlands disturbed during construction will be restored to original grade and returned to pre-construction conditions. There will be no temporary stockpiling of excavated materials on wetland areas.

The installation of the intake screens and intake pipes have been scheduled for a period during the months of November through March to avoid adverse impacts of aquatic life during the spawning season. This seasonal restriction will also avoid disruption of the anadromous fish run of American shad. The trench for the three intake pipes would be excavated by barge mounted equipment, and barges used for temporary stockpiling of excavated materials. There would be a short-term increase in suspended sediments but its impact would be minimized by the storage of materials on a barge rather than instream stockpiling, and the work is proposed to be done during a period of low biological activity.

The trench excavation will require blasting on the lower two feet of the intake screen location. The high peak pressures and rapid rise times of shock waves produced by explosives have been found to be the most damaging to fish. In order to minimize adverse impacts a "scare charge" will be detonated near the blast area to clear the area of finfish prior to the excavation blast. The peak shock waves will be minimized by placing small charges at the bottom of a drilled hole and all blast holes will be stemmed with sand.

After the intake structure and intake pipe have been placed in the trench the excavated material will be used as backfill in the trench. The intake structure will be supported by a continuous concrete foundation and will be protected from erosion by a rip-rap blanket. Excess excavated rock will be used for the rip-rap blanket.

Operational Impacts -

Long-term impacts resulting from the operation of the pumphouse facility would include an increase in the background noise level in the immediate vicinity of the pumphouse and a change in the existing aesthetics of the site. These impacts are proposed to be mitigated by sound insulating the pumphouse and landscape screening of the site to reduce noise levels. Landscaping utilizing flora indigenous to the area in addition to the design and construction of the pumphouse structure being aesthetically compatible with the surrounding historic district would minimize any long-term aesthetics impacts.

Operation of the water intakes can impact aquatic biota through entrainment and impingement. Entrainment refers to the passage of small planktonic or nektonic organisms through the intake screens and impingement is the capture of aquatic organisms on the screens. The intake screening system as described in the RMC Biological Evaluation, 1980 report is

"state-of-the-art" technology in reducing impacts of entrainment and impingement. Some loss of aquatic organisms would occur but the potential for adverse impact will be minimized by the use of these screens. The early life stages of several finfish occur in the vicinity of the intake but their potential for involvement with the intake is low. Most fish eggs and larvae are too large to be entrained through a 2 mm slot and the combination of an intake velocity of less than 0.3 foot/sec. and a parallel river velocity of at least twice the intake velocity would practically eliminate impingement of organisms. The small percentage of water (maximum of 3 percent at low

flow and 1.25 percent of average flow at Trenton) and organisms that would be withdrawn from the river through this intake would not result in biologically significant impacts to the aquatic community.

The control of chlorides during low flow drought conditions has been and is a primary objective of the DRBC's comprehensive water resources planning and regulatory process. Withdrawal of freshwater as permitted and conditioned by the DRBC has been determined by them to have no significant adverse impact on the Delaware River system. One of the basic missions of the DRBC is to understand and control the movement of salt water in the estuary. The DRBC can curtail or suspend operation of the project; the Commission will also review and consider bi-annual monitoring reports which must be made by the NWRA on ecological changes (if any). The Federal District Court has affirmed on 17 August 1981 that it is the role of the DRBC to make flow determinations along the Delaware in the interest of precluding the upstream advance of salinity of well fields and surface water users of the river waters. (District Court, 1981).

Pumpage of water for power generation by Philadelphia Electric Company (PECO) would be suspended when river flow at Trenton is less than 3,000 cfs, unless compensated by off-stream storage. Therefore, salinity intrusion would not be affected by withdrawal of freshwater for use by the Limerick Generating Station during drought conditions.

Approximately 90 percent of the water diverted from Point Pleasant for municipal water supply needs in Bucks and Montgomery Counties would return to the basins hydrologic system. The net loss of freshwater able to repel chlorides during a drought would be about 4.5 mgd (7 cfs). The Point Pleasant Diversion, as conditioned by DRBC Section 3.8 approvals of Limerick Generating Station and the Neshaminy Water Supply System would have no significant affect on salinity intrusion during a drought in the Delaware River Basin.

The proposed project would not have a significant adverse impact on down-stream dissolved oxygen (D.O.). A model simulation was performed by the DRBC Level B staff using their one dimensional version of the Delaware Estuary water quality model. Parameters included were low river flow (2780 cfs) and the maximum water diversion at Point Pleasant (95 mgd). This resulted in a predicted reduction in D.O. of only 0.08 mg/l in the Trenton to Philadelphia reach (zone 2). There would be an even smaller reduction in dissolved oxygen when the river flow is greater than 3,000 cfs or when lesser volume of water is diverted as river flow falls below 3,000 cfs during drought conditions (DRBC, 1980).

The cumulative effect of the Point Pleasant Diversion together with the existing withdrawals would have no significant adverse effect on salinity intrusion or dissolved oxygen to the City of Philadelphia, to the South Jersey aquifers, or to fish and wildlife resources.

V. Alternatives

Available pumping station sites along the Delaware River that would be physically and economically feasible to develop for pumping water to the headwaters of the Neshaminy and Perkomen watersheds are extremely limited. The general area was investigated quite thoroughly for such sites before the present site at Point Pleasant was selected (DRBC, 1973).

The topographical configuration and present land uses of the area at and southwest of the Village of Point Pleasant is such that it does not offer a wide choice of sites for a major pumping installation. The northern portion of the Village, being more developed, would be an undesirable and costly location for an intake, pumping station and transmission pipeline; also locating the pump station in a more northerly location is precluded by the existence of archaeological sites. The southernmost portion is severely restricted by the lack of adequate level terrain due to the closeness of the bluff and State Route 32 to the river bank. Locating the pump station in a more southerly direction is further precluded by the existence of an archaeological site located southeast of the proposed intake conduit.

Another major constraint is the location and effect of the Tohickon Creek. The combined Transmission Main should, if possible, be located south of the Tohickon Creek in order to avoid crossing a major stream in a deep rock valley. In addition, upon entering the Delaware River, the water from Tohickon Creek produces a significant change of flow velocity of the river with the accompanying turbulence and eddies. The effect of the eddies has

been the build-up of a large sediment deposit in the river below the mouth of the Creek. The river intake should be located at some distance away from these alluvial deposits in order to avoid siltation at the intake entrance.

The proposed intake alignment intercepts the actual river channel and thus the main river at about a right angle and approximately 800 feet downstream of the mouth of the Tohickon Creek. At this point, the river channel has returned to a more normal cross-section after having been restricted by the alluvial deposition below its confluence with the Tohickon Creek. In summary, once it was determined that the Point Pleasant area was the appropriate location for the withdrawal the specific site selected for the pump station is the most practicable.

An onshore traveling screen intake system aligned flush with the river bank was considered as an alternative to the presently proposed wedge-wire intake system. It was determined that a traveling screen system would adversely impact the aquatic environment by impingement and entrainment losses. The presently proposed intake would mitigate those losses.

VI. ENDANGERED SPECIES

A biological assessment was prepared addressing the potential effects of the project on the endangered shortnose sturgeon, Acipenser brevirostrum, pursuant to Section 7 of the Endangered Species Act. The assessment was forwarded to the National Marine Fisheries Service who have in turn prepared a biological opinion. The opinion concluded that construction and operation

of the Point Pleasant Pumping Station is not likely to jeopardize the continued existence of the endangered shortnose sturgeon in the Delaware River. No critical habitat has been designated in the area. No other Federally threatened or endangered species are known to occur at the project site.

VII. CULTURAL PRESERVATION

The Pennsylvania Canal is on the National Register of Historic Places and is a National Historic Landmark. Subsequent to our receiving this permit application, it was determined by the Keeper of the National Register that the Point Pleasant Historic District, within the boundaries of which the intake structure will be located was eligible for inclusion on the Register.

In view of the above, and pursuant to the National Historic Preservation Act, 16 USC 470, and regulations thereunder, 36 CFR 800, we have coordinated processing of this permit application with the Pennsylvania State Historic Preservation Officer and with the Advisory Council on Historic Preservation. We have entered into a Memorandum of Agreement with the SHPO and the ACHP to safeguard these historic places. The terms of the memorandum will be made a condition of the permit.

VIII. FINDINGS

A. ENVIRONMENTAL IMPACT STATEMENT

Three Final Environmental Impact Statements have already been written in connection with the Point Pleasant Diversion Project: (1) U.S. Atomic Energy Commission, (1973); (2) Delaware River Basin Commission, (1973); (3) Department of Agriculture, Soil Conservation Service, (1976). In addition, a Final Environmental Assessment was written by DRBC in 1980 which was so complete and comprehensive as virtually to constitute a fourth EIS.

The Project was challenged in Delaware Water Emergency Group v. Hansler, referred to in Part I of this assessment, and the plaintiffs there argued, among other things, that a new EIS was needed before valid action could be taken. The Court rejected this contention, finding that at some point, it is appropriate to act, based on knowledge at hand, even though studies may be continuing. The Court observed:

I do not think that Congress ever
intended to so burden Federal
action with interminable study
upon study.

No new Environmental Impact Statement is required for construction of the Point Pleasant Diversion Project, whole and entire. Only the portion thereof known as the intake structure is within Corps jurisdiction and the subject of this permit application; to consideration of that portion we now turn.

B. NO MAJOR FEDERAL ACTION

None of the planning, engineering, construction, or operation of the Point Pleasant intake structure has been or will be performed or funded by the Federal Government; all of that "action" has been and will be non-Federal. Nevertheless, issuance of a permit will effectively transform such work into "Federal action", and the Government's representatives will vicariously become the actors. Whether or not the action will be major depends upon the nature, scope, and magnitude of the work permitted.

"Major" is a term of reasonable connotation which may appropriately be applied to a project involving many millions of dollars, large areas, and displacement of a large number of persons, e.g., a dam and reservoir covering many square miles, construction of an interstate highway, construction of a penitentiary, and so on. This intake structure does not fall within that category. The work will cost an estimated \$3-6 million, it will not affect any large area, it will displace no persons, and it will affect no large segment of wildlife. Issuance of a permit for the intake

structure will be, not a major, but a minor Federal action, and accordingly will require no Environmental Impact Statement.

G. NO SIGNIFICANT EFFECT

Installation of the water intake, conduit, and pumphouse will be accomplished by use of ordinary heavy construction methods, as outlined in Section IV. A. of this assessment. That construction will impose upon a very limited number of persons the slight disruption and inconveniences attendant upon laying of a water main in a rural area. In no sense can this construction be construed as having any significant effect upon the quality of the human environment.

Operation of the intake system might, on a given day, remove a maximum of 95 million gallons from the River. What effect this will have depends upon: (1) how many days the system is used, (2) how much of the water is returned to the River, and (3) how voluminous is the stream flow. All of those matters have been studied and analyzed in the documents mentioned in Section I of this assessment, e.g., DRBC Final Environmental Assessment, August 1980. In particular, it has been determined that operation of this intake will affect dissolved oxygen content in the River only to a slight degree, and will affect salinity in the estuary to an imperceptible extent.

We therefore conclude that issuance of this permit will not significantly affect the quality of the human environment, within the meaning of the National Environmental Policy Act, Section 102, (42 USC 4332 (2) (C)). We further find that there are no unresolved conflicts concerning alternative uses of available resources, within the meaning of NEPA, Section 102, (42 USC 4332 (2) (E)). Accordingly, no Environmental Impact Statement will be prepared in regard to issuance of this permit.

14 October 1982

DATE

R. L. Baldwin

ROGER L. BALDWIN

Lieutenant Colonel, Corps of Engineers

District Engineer

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

11/30/82

DEL-AWARE UNLIMITED, INC., :
VAL SIGSTEDT, COLLEEN WELLS, MARC :
SADOUX, MARION W. MASLAND, Township :
of Bristol, NORMAN and DIANE :
TORKELSON, The PHILADELPHIA :
FEDERATION of SPORTSMEN'S CLUBS, :
SAMUEL LANDIS, CHARLES GILMORE, :
MARY ELLEN NOBLE, The PENNSYLVANIA :
STATE FEDERATION of SPORTSMEN'S :
CLUBS, Honorable RITA C. BANNING, :
WATERSHED ASSOCIATION of The :
DELAWARE RIVER, Honorable JAMES C. :
GREENWOOD, and HONORABLE CARL :
FONASH. :

CIVIL ACTION

Plaintiffs, :

vs. :

ROGER M. BALDWIN, individually, and :
as District Engineer, U.S. Army :
Corps of Engineers, and :
ALEXANDER ALDRICH, individually, :
and as Chairman of the Advisory :
Council on Historic Preservation, :
WILLIAM GORDON, individually, and as :
Assistant Secretary, U.S. Department :
of Commerce, GERALD HANSLER, :
individually and as Executive :
Director, The Delaware River Basin :
Commission, HAROLD DENTON, :
individually, and as Director, :
Division of Nuclear Reactor :
Regulation, U.S. THE NUCLEAR :
REGULATORY COMMISSION, HONORABLE :
PETER DUNCAN, as Secretary of the :
Department of Environmental :
Resources of the Commonwealth of :
Pennsylvania, NESHAMINY WATER :
RESOURCES AUTHORITY, and :
PHILADELPHIA ELECTRIC COMPANY. :

NO. 82-5115

Defendants. :

Reported by:
Sidney Rothschild
Gregg Wolfe

OFFICIAL COURT REPORTERS

Room 2722
U.S. Courthouse
Philadelphia, Pa. 19106

WALSH 5340

A. 161

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Philadelphia, Pennsylvania

November 30, 1982

BEFORE: HONORABLE JAMES T. GILES, J.

FIRST DAY

A-162

1 APPEARANCES:

2 ROBERT SUGARMAN, ESQ.,
3 MARY COE, ESQ.,
4 ROBIN LOCKE, ESQ.,
5 for Federal Defendants.

6 JANICE SIEGEL, ESQ.,
7 JOAN K. GARNER, ESQ.,
8 for Federal Defendants.

9 PETER CRANE, ESQ.,
10 Acting Assistant General Counsel
11 for The Nuclear Regulatory Commission.

12 HERSHEL J. RICHMAN, ESQ.,
13 WILLIAM J. CARLIN, ESQ.,
14 ALAN M. LERNER, ESQ.,
15 for Meshaminy Water Resources Authority.

16 DAVID J. GOLDBERG, ESQ.,
17 for Delaware River Basin Commission.

18 BERNARD CHANIN, ESQ.,
19 TROY B. CONNER, JR., ESQ.,
20 ROBERT M. RADER, ESQ.,
21 for Philadelphia Electric Company.

22 LOUISE S. THOMPSON, ESQ.,
23 Assistant Counsel
24 for Commonwealth of Pennsylvania
25 Department of Environmental Resources.

1 THE COURT: Good afternoon.

2 I have read the various papers filed yesterday
3 and this morning. The purpose of this conference was to
4 discuss the scope of the hearing for this Court's review
5 of the administrative proceedings all of which this Court
6 has appellate jurisdiction, adding which are ripe for review.

7 With respect to the scope of review, in a sense,
8 both sides are right. This Court is limited in its review
9 of the administrative agency to the administrative record,
10 to determine whether or not, under either a reasonableness
11 standard or an arbitrary and capricious standard the agency
12 somehow misapplied the law, misinterpreted the evidence,
13 overlooked certain testimony, or unreasonably reached no
14 significant impact determinations.

15 This Court will review the administrative
16 record to the extent that the plaintiff alleges that the
17 administrative record fails to show a basis for the actions
18 or the determinations of the agency.

19 The burden will be upon the plaintiff to show
20 that the agency failed to consider what plaintiffs contend
21 to be significant environmental impacts.

22 Here, the plaintiffs contend, I believe, that
23 there was legal error in that some or all of the defendants
24 had responsibility for preparation and promulgation of
25 environmental impact study and failed to cause such to be

1 issued, prepared, issued or promulgated. So, the plaintiff
2 will have the burden of showing that, under the law and the
3 administrative record evidence, that such environmental
4 impact study was required.

5 Testimony outside of the administrative record
6 is not precluded in my opinion as a matter of law; the
7 Court has discretion to permit it, where it would tend to
8 advance specific allegations by the plaintiffs that the
9 administrative record is deficient, so as to render the
10 decision made by the administrative agency without evidence
11 and without consideration of the various environmental
12 considerations imposed under the regulations and statute
13 upon the agency to review, analyze and consider.

14 This Court will not sit in judgment on the
15 decision-makers in the agency or agencies.

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1 This Court's scope of review will be
2 whether or not the administration record demonstrated that
3 the defendant agencies carried out their responsibilities
4 procedurally in terms of the applicable statute and
5 statutes -- here we're talking, I believe, about the National
6 Environmental Policy Act principally, as those obligations
7 have been interpreted by the Supreme Court of the United
8 States and by the Third Circuit.

9 With respect to the review of the administra-
10 tive record and the facts and the conclusions therefrom
11 already given by this Court in Delaware Water Emergency Group
12 et al. vs. Gerald M. Mansler, and an opinion rendered by
13 my colleague, Judge VanArtsdalen, the same will be binding
14 upon the parties and will be adopted by the Court as the
15 bottom to this Court's supplemental consideration of what
16 may be the supplemental administrative record applicable to
17 this case.

18 Therefore, this Court adopts as finally
19 binding upon all of the parties to this litigation the
20 decision by Judge VanArtsdalen.

21 Now, Mr. Sugarman, as I see it, you have a
22 burden of showing in this court that there is final agency
23 action, which is within my jurisdiction to review, and that
24 the agency failed to perform some non-discretionary function,
25 or acted arbitrarily and capriciously in avoiding

A-166

1 consideration of ancillary factors which point towards
2 significant environmental effects, as opposed to no environ-
3 mental or no significant environmental impact.

4 Now, that reference to the administrative
5 record means more than whether or not the agency declined
6 to receive a certain position of some witness of the
7 plaintiffs appearing for the agency. The burden of the
8 plaintiff would be to show that the agency failed to consider
9 the subject from whatever source.

10 So I expect you to identify presently what
11 you consider to be complete omissions, as well as significant
12 omissions of subjects which would have rendered the conclusions
13 of the agency erroneous as a matter of law.

14 Are there any questions about what I conceive
15 to be the scope of review?

16 MR. SUGARMAN: I think your Honor has drawn
17 on certain aspects of the Overton Park case in identifying
18 the scope of review and, of course, that is the governing
19 Supreme Court statement of the scope of review, and the
20 issues before the Court.

21 I would like -- I understand that the Court's
22 direction is that the testimony of witnesses, that as to
23 matters not in the administrative record, would go to show
24 that the agency acted without evidence or without considera-
25 tion of various environmental requirements imposed by

1 statutes and regulation on the agency.

2 THE COURT: I said it may be received.

3 I didn't say it absolutely will be received.

4 MR. SUGARMAN: I am sorry, it may be received.

5 THE COURT: If it's going to go to what I
6 concede to be your burden of proof --

7 MR. SUGARMAN: Right, exactly. That's the
8 point I wanted to address, sir.

9 I would raise two questions, if I may. One
10 is that the Administrative Procedure Act in its language
11 and as interpreted by the Overton Park case, indicates that
12 among the issues to be considered, are whether the agency
13 abused its discretion or acted under an error of law or mis-
14 understanding of the statute, and whether its actions were
15 abusive discretion in that respect.

16 Now, I take it from your Honor's description
17 of the standard of review, that that question would be
18 included.

19 THE COURT: Yes.

20 If it's as a matter of law, but not -- I
21 would have exercised a different approach in resolving the
22 factual dilemma.

23 MR. SUGARMAN: I understand your Honor's
24 statement then very clearly.

25 The other question that I would have is that

1 the defendants will specify portions of the record that they
2 believe to be directly counter or responsive to what you
3 contend and then you will have an opportunity to specify
4 other parts of the record, if you wish, by the next morning
5 and I will read it. I am going to have to read most of the
6 record anyway and I am not frightfully afraid to do that,
7 and if we were to start tomorrow, I would be in no better
8 position, in terms of reviewing the essential documents than
9 I would be at the close of tomorrow or even Thursday morning.

10 MR. SUGARMAN: I don't think you would be,
11 my point is this --

12 THE COURT: Now, that is the way we will do it.
13 We will start on Thursday morning with your presentation of
14 those portions of the record that you believe to be significant,
15 as outlined yesterday, and you may argue to me why you believe
16 there has been a post-Judge VanArtsdalen's decision change, and
17 why you believe the Commission failed within the scope of the
18 entire record to consider that subject; that's what I said
19 this morning.

20 MR. SUGARMAN: That applies to the DRBC?

21 THE COURT: Yes, and on each point I will give
22 you a chance to argue, and I will give the other side a chance
23 to argue before I decide whether or not testimony is necessary
24 to educate me, because each one of these points becomes
25 really a little trial within itself.

A-169

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NO.

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FILED

IN THE SUPREME COURT

OF THE
NOV 14 1983

UNITED STATES

ALEXANDER L. STEVAS.

CLERK

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED, INC., et al,
Petitioners,

v.

ROGER M. BALDWIN, District Engineer,
United States Corps of Engineers, et al.
Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROBERT R. ELLIOTT
ELLIOTT AND BELL, P.C.
1201 PENNSYLVANIA AVE. NW
SUITE 803
Washington, DC 20004
(202) 887-5858

ROBERT J. SUGARMAN
ROBIN T. LOCKE
Counsel for Petitioners

Of Counsel:
SUGARMAN & DENWORTH
121 South Broad Street, Ste. 510
Philadelphia, PA 19107
Dated: October 31, 1983

TABLE OF CONTENTS

1.	Judgment Order and Order Sur Petition for Rehearing.....	A-1
2.	Order of the District Court December 12, 1982.....	A-6
3.	Bench Opinion with Correction Sheet December 15, 1982.....	A-9
4.	Findings of Fact (Proposed by NWRA and Adopted by the District Court).....	A-79

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1010

DEL-AWARE UNLIMITED, INC. et al.

Appellants

v.

ROGER M. BALDWIN, et al.

Appeal from the
United States District Court
for the
Eastern District of Pennsylvania
(D.C. Civil Action No. 82-5115)
District Judge: Honorable James Giles

Argued June 13, 1983

Before HUNTER, HIGGINBOTHAM,
Circuit Judges, and
ZIEGLER, District Judge

*Honorable Donald E. Ziegler, United
States District Judge for the Western
District of Pennsylvania, sitting by
Designation

JUDGMENT ORDER

Appellants appeal from an interlocutory order of the district court denying appellants' motion for preliminary injunction. After consideration of all contentions raised by appellants, to wit, that the court erred:

1) as a matter of law by excluding from evidence virtually all of appellants' proffered testimony and documentation which was not included in the Corps' administrative record;

2) in holding that section 110(f) of the National Historic Preservation Act did not require the Corps to implement measures and consider alternatives which would minimize harm to the Pennsylvania Canal;

3) in finding that the Corps had given "great weight" to the views of the state and federal fisheries agencies, as required by its statute and regulations;

4) in finding insufficient likelihood of success on the merits of the NEPA claims to require injunctive relief,

It is ADJUDGED AND ORDERED that
the judgment of the district court be and
is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/S/ James Hunter, III
JAMES HUNTER, III,
Circuit Judge

Attest:

/S/
Chief Deputy Clerk

Dated: July 5, 1983

Certified as a true copy and issued
in lieu of a federal mandate on
August 10, 1983

Test:

Clerk, United States Court of Appeals
for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1010

DEL-AWARE UNLIMITED INC., et al.

Appellants

v.

ROGER M. BALDWIN, et al.

SUR PETITION FOR REHEARING

Present SEITZ, Chief Judge, ALDISERT,
ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM, BECKER,
Circuit Judges

The petition for rehearing filed by

APPELLANTS

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JAMES HUNTER
Judge

Dated August 2, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., : CIVIL ACTION
et al. :

v. :

ROGER M. BALDWIN, et al. : No. 82-5115

ORDER

AND NOW, this 7th day of
December, 1982, in accordance with the
bench opinion rendered December 15, 1982,
it is hereby ORDERED that:

1. The claims asserted by plain-
tiffs under the Rivers and Harbors Act,
33 U.S.C. § 401, et seq., the Clean Water
Act, 33 U.S.C. § 1365, et seq., the
Endangered Species Act, 16 U.S.C. § 1540,
et seq., and the National Historic
Preservation Act, 16 U.S.C. § 470, et
seq., are DISMISSED for lack of jurisdic-
tion.

Entered: 12-20-83

CLERK OF COURT

2. Plaintiffs' claims against the Nuclear Regulatory Commission, and Harold Denton in his individual and official capacity are DISMISSED for lack of jurisdiction.

3. Plaintiffs' claims against the Department of Environmental Resources of the Commonwealth of Pennsylvania (PDER), and Peter Duncan in his official capacity as Secretary of PDER, are DISMISSED for lack of jurisdiction. In the alternative, these claims are DISMISSED on the basis of comity and this court's determination not to exercise pendent jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

4. Plaintiffs' claims against Roger Baldwin, District Engineer, U.S. Army Corps of Engineers, Alexander Aldrich, Chairman of the Advisory Council on Historic Preservation, William Gordon, Assistant Secretary, U.S. Department of

Commerce, and Gerald Hansler, Executive Director of the Delaware River Basin Commission (DRBC), in their individual capacities, are DISMISSED.

5. Plaintiffs' motion for preliminary injunction as to the remaining defendants asserted under the National Environmental Policy Act (NEPA), 16 U.S.C. § 150, et seq., the Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq., and under common law with respect to the DRBC, is DENIED. Whether singly or cumulatively, the issues raised by plaintiffs are insufficient on the record evidence to show that defendants acted unreasonably, arbitrarily or capriciously in determining that an Environmental Impact Statement was not required and in rendering a negative declaration as to the planned construction of the Point Pleasant Water Diversion Project.

BY THE COURT:

/s/ JAMES T. GILES

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., : CIVIL ACTION
et al. :

Plaintiffs : No. 82-5115

v. :

ROGER M. BALDWIN, et al. :

Defendants :

- - -

December 15, 1982

BEFORE: HONORABLE JAMES T. GILES, J.

Reported by:

Sidney Rothschild OFFICIAL COURT
REPORTERS

Room 2722
U.S. Courthouse
Philadelphia, Pa 19106

Walnut 5-9480

THE COURT: Good afternoon.

First of all, the record will be completed by the following: By letter of submission of December 8, 1983, DRBC sent in a copy of its Exhibit Number 15. That will be admitted.

By letter of submission of December 13, the plaintiffs submitted a copy of P58, which is a memorandum dated May 28, 1981, Archaeologist, Office of Cultural Programs, NERO, HRS to Assistant Regional Director, Office of Cultural Program NERO, HRS Subject: Trip Report, Point Pleasant Water Diversion Project, Point Pleasant, Pennsylvania.

This document will be admitted.

Philadelphia Electric Company was given leave to file certain documents pertaining to proceedings before the NRC, in response to plaintiffs' submissions pertaining to NRC matters. Those submission will be admitted as PECO exhi-

bits, whatever the next PECO number is, according to the record.

MR. CHANIN: If Your Honor please, that is Exhibit 4.

THE COURT: That will be admitted along with the certificate of service form which is attached thereto.

The hearing in this matter concluded Friday evening, the Court has reviewed the entire administrative record, all the exhibits introduced in this proceeding, the various memoranda, responses, attachments thereto, legal authorities cited, including statutes, regulations and legislative history.

Counsel are to be commended for doing a fine job in pulling together, in a short time, during and after the conclusion of the proceeding, the evidence in the case and focusing it in a manner helpful to the Court.

I have agreed to give a bench opinion because both parties have asserted that by today, by virtue of the actions proposed of the NWRA to commence construction, it would suffer or begin to suffer irreparable harm. I devoted my time to this point in reviewing the record and making my decision and this opinion will constitute the opinion of the Court with respect to the plaintiffs' motion for preliminary injunction. The Court reserves the right to supplement, amend or edit the same.

This action was commenced by plaintiffs substantially as citizens action against various federal agencies, the Pennsylvania Environment Resources Department, DER, PECO, Philadelphia Electric Company, and NWRA, which is the Neshaminy Water Resources Authority.

Individuals have also been named as defendants in their individual

and official capacities, where they are the executive directors of the various defendant agencies.

This action is commenced against all defendants, it appears under the National Environmental Policy Act, the National Historic Preservation Act, the Endangered Species Act, the Delaware River Basin Compact, the Fish and Wildlife Coordination Act, the substantive provisions of Section 110 of the River and Harbors Act of 1899 and Section 404 of the Water Pollution Control and Federal Water Pollution Control Act requirements for permits under Section 402 and for best available technology under Section 316(b) and the Atomic Safety and Licensing Act and regulations thereunder, referring to page 2 of the complaint.

The plaintiff either orally or in the final briefs in this matter has

asserted that it intended to file a claim under the Administrative Procedure Act, the plaintiff does not assert a claim under the Administrative Procedure Act. For purposes of this bench opinion, I shall assume that the plaintiff has standing to assert and therefore is entitled to amend the complaint to assert claim under the Administrative Procedure Act against the appropriate agency defendants.

The complaint, while it names the Delaware River Basin Commission as a defendant and its executive director, in the caption fails to state a cause of action in its body against the Delaware River Basin Commission.

The plaintiff was understood by the Court to amend orally the complaint at the time of the hearing to assert a claim against the DRBC, that its denial of the Delaware petition for reconsidera-

tion was arbitrary and capricious and therefore reviewable in this Court.

Various defendants have filed motions to dismiss, either on jurisdictional grounds with respect to certain allegations or with respect to failure to state a claim upon which refusal can be granted.

With respect to the claims of the plaintiffs asserted under the National Historic Preservation Act, the Endangered Species Act, the Clean Water Act and the River and Harbors Act, I find that this court has no jurisdiction. Those acts of Congress have specific provisions which limit the right of citizens to bring suits in this Court. There are notice and provisions which are mandatory. There is no implied cause of action under the River and Harbors Act, in accordance with the decision of the

United States Supreme Court and using the same rationale, there is no implied cause of action under either of the National and Historic Preservation Act and Endangered Species Act or Clean Water Act.

Congress has acted in these areas to circumscribe the availability of the federal court to plaintiffs unless and until certain statutory requirements are met. Plaintiffs appear to concede as much in that they argue in their beliefs that they would still have a right of action under the Administrative Procedures Act, because either there is final agency action or that there is action by the agency which is so threatening of immediate and irreparable harm that resort to the Court is necessary to enjoin agency action.

With respect to plaintiffs' claims against the NRC and Harold Denton in his individual and official capaci-

ties, I find that this court is without jurisdiction in the context of this complaint, even assuming that the Susquehanna case is still good law in this circuit. First, there is an ongoing administrative review of the PECOLimerick application within the domain of the Nuclear Regulatory Commission. Plaintiffs, through Delaware are participating in that administrative proceeding, which is not complete. When completed, the plaintiffs, if agreed, will have a right of appeal to the Third Circuit by statute.

Number two, the construction activity which is the subject of this injunction action names NWRA as the builder and constructor of the water system. NRC has no jurisdiction to enjoin NWRA's construction. NRC will determine when, if at all, the PECO water

diversion to Limerick I or II will be operational. That is not before this Court.

Furthermore, the NRC has not refused to prepare an environmental impact study. This situation is easily distinguishable from the Susquehanna case cited by the plaintiffs for the reasons just enumerated.

So, the claims asserted under the Atomic Safety and Licensing Act, are hereby dismissed.

With respect to the claims against Roger Baldwin, as an individual; Alexander Aldrich, as an individual; William Gordon, as an individual and Gerald Hansler, as an individual; I find that the plaintiffs' complaint fails to state a cause of action and those actions will be dismissed with prejudice for the following reasons. Although the plaintiffs assert that Baldwin, Aldrich, Gor-

don and Hansler are being sued in their individual capacities, a review of the complaint discloses no action by those individuals which amounts to individual actions, as opposed to action in their official capacities.

Moreover, the relief sought by the plaintiffs is against the agency. If plaintiffs are asserting a claim under the Administrative Procedures Act, for example, the proper claim is against the agency, not the individual.

Moreover, I would find from a review of the record and the complaint, that each of the individuals is entitled to qualified immunity. I might say, as well, that the proceeding is not really as on motion to dismiss. It's after hearing.

With respect to the Pennsylvania Department of Environmental Resources

and Peter Duncan, I find that this Court has no jurisdiction. The claims there asserted are under the Clean Water Act. Again, there is a jurisdictional requirement of notice.

Moreover, I doubt that this Court would have jurisdiction in an APA claim against federal agencies, over state agencies, with respect to their administrative agency compliance. Further, the plaintiffs are pursuing in the state administrative channels, challenges to the Pennsylvania DER Acts with respect to various certificates or decisions not to require permits of various kinds.

As a matter of comity, plaintiffs would be required in this Court's estimation, to exhaust administrative remedies in the state procedure and seek whatever relief is appropriate there.

So, even assuming that this Court has jurisdiction with respect to

the Pennsylvania DER defendants, it would not exercise that jurisdiction.

For those reasons, the complaint with respect to Peter Duncan as secretary of the DER is dismissed. As a footnote, I observe that there is no emergency situation arising from the claimed inaction of the state official in this instance. It is conceded that the Delaware River Water will not in any way lower the standards of the water in the Perkiomen Creek and that the best available technology is being used for the intake at Point Pleasant.

Remaining, I find are claims asserted under the National Environmental Policy Act and the Administrative Procedure Act. Having studied all of the relevant material, as well as that which might be irrelevant, but admitted and reviewable, I have concluded that the

plaintiffs' motion for preliminary injunction will be denied under both the NEPA and the APA against each of the remaining defendants.

First, with respect to the NEPA and the Corps of Engineers. Plaintiffs complain that the Corps of Engineers in rendering its environmental assessment and negative declaration with respect to the Point Pleasant intake and water diversion system, either acted unreasonably or arbitrary and capriciously in failing to require or failing to conduct an environmental impact study or statement.

The standard of reasonableness is a higher standard of review than arbitrary and capricious, but I find under either standard, the plaintiffs at this juncture on this record have not shown under the standard applicable to considering requests for preliminary in-

junction have entitlement to that extraordinary relief. This Court is limited under the reasonableness standard to a review of the actions of the defendant agencies and cannot engage in its own personal evaluation of the mental processes of the agency administrators.

So, it's not a matter of record of what this Court would do if it were in the agency's position; it is what the record shows reasonably was considered, taking not only the findings but the administrative record as a whole and considering the administrative record as a whole, I find that with respect to a significant number of plaintiffs' claims, they are collaterally estopped because of the Hansler decision.

The plaintiffs have made out a prima facie case with respect to identifying certain changes since the Hansler

decision, which would be of significant impact, if the plaintiffs' allegations were taken as true, but considering the defendant agency's evidence as this Court must at this stage, I find that the plaintiff has not shown by a preponderance of the evidence that there was either an abuse of discretion or a failure to give a hard look at, seriously consider, or give great weight to other agency opinion.

The plaintiffs here are collaterally estopped by the Hansler decision to the extent that the Hansler decision considered or was asked to consider and decided matters which are raised in this complaint. A study of the complaint in the Hansler case demonstrates that it was wide ranging and touched upon almost all the issues which are raised here as if they were new.

The plaintiffs are bound be-

cause they are in privity with those plaintiffs who initiated the action before Judge VanArtsdalen in this respect: That the plaintiffs there, as the plaintiffs here represented the public interest and their interests and injuries now rise no higher and are no less than those asserted by the plaintiffs in Hansler for the public interest.

Judge VanArtsdalen considered not the name of the plaintiff but rather the issue, that is whether or not certain actions or environmental effects were significant or substantial so as to require of the DRBC the preparation of an environmental impact statement as opposed to a final environmental assessment. This Court incorporates all that was decided and considered and therefore precluded here by Judge VanArtsdalen in the Hansler case and as affirmed by the

Third Circuit.

What then is new?

1. Designation of the Army Corps of Engineers as the lead agency in determining those matters, environmentally, which were within its specific expertise: navigation, construction in the river, and matters relating to the construction as it would affect navigable waters.

2. A movement of the intake system away from the shore bank and into the channel of the Delaware River.

3. A formal determination by the Advisory Council on Historic Preservation that the village of Point Pleasant was eligible for and was then placed on the historic register.

4. An assertion that Shortnosed Sturgeon had been seen in the area of Point Pleasant intake although the report was unconfirmed.

A decision by the Corps of Engineers to segment its consideration of the NWRA permits between Point Pleasant and the Pine Run rechannelization.

A salinity study performed by the DRBC, a ground water study done for and by the DRBC.

Next, the most current good faith negotiations between those states who are parties to the DRBC.

Next, a statutory provision change, 110(f), I believe, which the plaintiffs assert required the Corps to take all possible steps to maximize non-impact on national landmarks or historical sites. In the latter category, assert that the authority had the obligation independently to consider other intake sites than Point Pleasant, so as to avoid the historical and archaeological sites altogether.

This Court is called upon, therefore, to interpret that provision. In the findings of facts or the statement of findings, the Corps made specific findings that it had considered alternative routes around Point Pleasant but those were unreasonable for the reasons stated therein. Moreover, in accordance with 33 CFR 800, a memorandum of agreement was entered into between the Corps, the Advisory Council and the State Historical Preservation officer, with respect to procedures to minimize the impact of the historic district, the channel, and all other areas disrupted by the construction. The undertaking in the memorandum agreement is to have continued monitoring by the Advisory Council, state office, the states, Historical Preservation officer and the Corps to insure that all possible steps are taken to minimize the impact to the historical district

canal. Indeed, as I read this agreement, no irreversible action can be taken out and a determination that the action is an action which meets their requirements of 33 CFR 800. The plaintiffs argue that Section 110(f) required the Corps to look for other intake sites along the Pennsylvania canal, other than Point Pleasant, once the historic district has been certified.

The Corps took the position in its findings, that it was bound in terms of its consideration of what was possible by the determination of the DRBC as to the appropriate point for water to be taken from the Delaware River.

In other words, it deferred to the DRBC with respect to that judgement as to whether or not that point of intake was most appropriate, given its other determinations of river resources, basin

resources and the needs for water in Bucks and Montgomery Counties, as well as for PECO at Limerick.

I do not find that that deference was unreasonable or arbitrary and capricious. There is a question as to whether or not Section 110(f) applied to other than federal or federally assisted projects. Assuming that it does, it is not to be given the same scope of agency determination requirement as was given and required by statute in the Overton Park case. In that case, the statute required that the agency make a determination that there was no feasible or practical route for highway, other than through a park and only after such determination was made, could be administrator go on to determine what steps should be taken to minimize the impact on the park area.

Here, the Congress decided to

delete the requirement for determination by the agency administrator as to feasible or practical alternatives, leaving only that section which required the administrator to determine what steps would maximize or diminish the impact on the historic district.

Considering the legislative history, I do not find that there was a requirement on the Corps to make a determination independently that there was some other place than Point Pleasant for the intake, assuming 110(f) applied. I find that the Corps did consider and gave great weight to the determination by DRBC, that Point Pleasant was the proper site for the intake to accomplish the water supply permits which it had issued, pursuant to the entire history of the Point Pleasant project, including those matters which were before Judge

VanArtsdalen.

To the extent that the Corps referenced and included all of the proceedings by reference that had gone before, I find on this record, that the Corps did consider that history in determining the appropriateness to defer to the DRBC decision to Point Pleasant as the intake location and there is evidence in the record that the Corps did review and consider all of the documentation pertaining to the Point Pleasant project as considered by the DRBC and the AEC and the NWRA. So, I do not find it reasonable to construe 110(f) as requiring an administrator to do other than take all possible steps open and available to it at that time to minimize the impact on the historic district or canal. The Corps considered all of the options open to it and on this record, acted reasonably in arriving at a

memorandum of agreement.

Under the applicable regulations, there's a presumption that the memorandum agreement satisfies the obligation of the Advisory Council to advise. I believe the language of the regulation is that the entering into a memorandum of agreement satisfies the obligations of the Advisory Council.

For that reason, I would find that as to the Advisory Council, that injunctive action is not appropriate under the Administrative Procedure Act. The Advisory Council has satisfied the requirements of the regulations. It has not undertaken any final action with respect to any irreversibly damaging action, with respect to the canal or the historic district as certified.

I find that the record is sufficient for this stage of the proceedings

to satisfy me that the Corps studied and considered the effect of moving the intake 245 feet into the Delaware River as it effects or is considered in conjunction with the black eddy, salinity, the effect on the oyster industry and fisheries, dissolved oxygen, shad, Shortnosed Sturgeon, blasting effects, dredging, effects on fish other than shad and Shortnosed Sturgeon, flow velocity at the intake, the effects of impingement and entrainment of fish at the intake, the level of the top of the intake in the river below the surface of the river at various flows, the effect on navigation, recreation and safety to those persons using the river at that point for fishing or other forms of river recreation.

With respect to the salinity, I find that the diversion of water could be said to have been reasonably found by the

Corps not to have any significant environmental impact. Only 8 CFS of the diversion can be said to be subject to consumption. As to that amount, there is no dispute that that is not measureable by existing gages. Critically important, it appears from the record, that to the determination of the DRBC and the Corps, that the Point Pleasant project would not have any adverse effect on the salinity level being placed at Point Pleasant, is that with the water returns, 50 percent of the water will be returned to the Delaware River above or at the Schuylkill River mouth.

The Schuylkill River mouth is stated in the literature in the record to be important as a stream flow to the curtailment of the salinity level.

So, all the water taken out will be put back in, at least that which

is measureable. So, to the extent the plaintiffs argue that the diversions will adversely affect salinity, I find that that is not borne out by the record. Moreover, it was considered and discussed by Judge VanArtsdalen.

With respect to dissolved oxygen, I find from this record, that there are studies available to the Corps which were available to the Corps which showed that these diversions or this diversion at Point Pleasant would have no significant environmental impact.

Flows less than that which would be caused by the diversions even at maximum diversion would not significantly change the dissolved oxygen level at any point along the river.

With respect to the flow velocity at the intake level, I find that the evidence is, in this record, satisfies the reasonableness and the arbitrary and

capricious test in that there were studies to show that given the placement of the intake, the kind of intake, the placement of the intake tubes close to one another and so forth, that there would be no significant impact on fish.

The studies made were put on a worse case basis, assuming that there was a spawning ground and the Point Pleasant eddy, that shad would be there as well as Shortnosed Sturgeon either spawning or moving past that point.

The size of the intake screens are two millimeters, that size was considered in relationship to the larva of shad and sturgeon and other fish, although no tests were made on shad per se, there were tests made on fish eggs smaller in size than shad eggs, leading reasonably to the conclusion that shad eggs would not be impinged.

Moreover, the swimming ability of shad was considered. The flow velocity is calculated to be two to one at the intake but the intake structure as presently designed, in cooperation with the Pennsylvania Fish Commission and the United States Fish and Wildlife Service is a state of the art intake, which has very little impact upon early stages of fish, even assuming less than 2-to-1 velocity flow at intake. The intake velocity diminishes dramatically as one moves one foot from the intake.

There was a netting operation in the vicinity of the intake for Shortnosed Sturgeon, which in 1981 disclosed no sturgeon. No sturgeon had been caught in the immediate vicinity of the intake.

The Shortnosed Sturgeon is an endangered species, there was a determination by the U.S. Department of Commerce

that the Point Pleasant water diversion project would not endanger species in the river; further made determinations that the proposed operations would not constitute significant environmental impact with respect to that endangered species. It made a determination that its biological opinion was not related to river flow, rather to what was known about the Shortnosed Sturgeon and that is, that its eggs fall to the river bottom, attach to rocks, or fall or find their way under rocks, and hence, are not subject to intake velocity considerations.

Moreover, there was a determination made but there would be ongoing studies by the applicant, so that monitoring would be made to insure that the project in no way endangered Shortnosed Sturgeon.

As I said before, the intake is designed anticipating the presence of Shortnosed Sturgeon, though there is no evidence of Shortnosed Sturgeon in the area.

On the basis of this record, I find there is no basis for injunctive action with respect to the Department of Commerce either under NEPA, under the APA.

Plaintiffs really have not offered anything to refute the biological opinion rendered.

MR. LERNER: Excuse me, Your Honor, can we take a brief recess?

THE COURT: You may.

With respect to esthetics, which would include the height of any buildings, the noise of any transformers, the replanting of any areas affected by the construction, including the bluff, the evidence shows that there is a memo-

randum of agreement to blend the underground piping and buildings in the environment.

Apparently, plaintiffs complain that the bluff outside of the certified historic district is not being considered. However, I understand from this record that the pipeline as to the bluff will be underground and covered.

There was the consideration of the archaeology in the area. There is no evidence at that time that there is any archaeology or aboriginal site in the direct line of the water transmission lines. There is an archaeologist, who as a condition of the permit is present at the site, supervising both operations in or about the canal as well as those pertaining to the esthetics. And, the Pennsylvania Historical Preservation officer is there to approve any and all

action.

Plaintiff claims the Corps acted arbitrarily and capriciously or unreasonably in failing to consult or to consult in good faith with the Fish and Wildlife Service which opposed the Point Pleasant diversion. I find that Corps did consult and did consider all of the positions advanced by the Fish and Wildlife Service as well as the Pennsylvania Fish Commission. Simply because the Fish and Wildlife Service had a reluctance to agree with the Corps, that the permit issue, it was the Corps' decision and not Fish and Wildlife's, with respect to permit issuance. The Fish and Wildlife Service did not elevate the matter as it had a right to do and its failure to do so is evidence that it did not on appeal see any significant environment impact.

Nothing new was raised by the

Fish and Wildlife Service that had not been considered by the Corps.

Plaintiffs argue that the Corps erred in not considering that with respect to the permit application the Pennsylvania Utility Commission had rejected PECO's application there for a license to commence operation of Limerick II. The record shows that reasonable it would have been engineering-wise unsound to treat the application and permit or construction as involving only water for Limerick II. Limerick I had been authorized and encouraged by the PUC. Moreover, NWRA, and independent water requirement and PECO's possible withdrawal with respect to Limerick II, would not have greatly enlarged the project of NWRA.

Plaintiffs argue that the Corps erred in issuing its permit while NRC or

other local state agencies had not acted with respect to their permits which might be required. I believe counsel conceded during the hearing, that there is no statutory or regulatory requirement in that regard.

Plaintiff's main argument is that the Corps erred in segmenting the Point Pleasant project from the Pine Run rechannelization.

There is a regulation which requires applicants to submit applications for an entire project as opposed to piecemeal submission, that regulation came into effect in 1982, two years after the applications had been filed by NWRA; that regulation does not take away the discretion of the Corps to determine that objectively there should be division of the project and here there is evidence that the rechannelization though beneficial too, is not essential to the opera-

tion of the water diversion system project. Therefore, even if there is some environmental effects relative to the rechannelization, it is not essential to the operation of the system. With respect to the canal, itself, Pennsylvania authorities have review the proposed construction and have determined that the proposed construction under the canal will benefit the canal. The Commonwealth of Pennsylvania owns the canal. The kind of intrusions into the canal or under the canal, are not uncommon along its route.

Now, with respect to the plaintiffs' claim that the Corps did not consider a final level B study or a ground water study done for the DRBC in making its determinations, I find that again, it was reasonable for the Corps to defer to the DRBC and this is consistent with the determination by Judge VanArtsdalen in

the Hansler case. The level B study is not inconsistent with the management powers of the DRBC to limit the withdrawals for PECO, if river flow is below 3000 CFS and to manage the withdrawal of the potable water by NWRA in times of drought, nor is it inconsistent with the declared management objectives of the DRBC at Montgomery-Bucks County or other areas having ground water, develop a better system for utilization of ground water in conjunction with surface water.

With respect to the ground water study completed in September of 1982, it does appear from the report that the rechargeable rate for wells in the kind of rock which is prevalent in these counties is very slow and unpredictable.

With respect to plaintiffs' contentions that PECO or NWRA could get their water from Philadelphia or other

places, including ground water wells, I find that the plaintiffs' claim of arbitrary and unreasonable would fail based on the Pennsylvania DER Assessments and studies rejecting that possibility as being unworkable, both water-wise and in terms of its hope for industry or population growth patterns to diminish the effect on consumption of water. Plaintiffs argue, as well, that the Corps or DRBC did not consider the Schuylkill River or upstream Schuylkill River storage as an alternative to taking out of the Delaware River. Again, the record shows that there was consideration by DRBC and Pennsylvania DER of upstream storage possibilities, along with PECO, as well as the availability of water at times required by the Limerick operation from the Schuylkill and those alternatives were rejected.

With respect to the Schuylkill in terms of temperature of the water or low flows or adverse environmental conditions which would arise from a diversion, now, I do not find as a matter of law that the Corps was obligated to do an independent study of every matter that might have been raised by the plaintiffs. The Corps was entitled to review, to consider the source of the liability, the measurements and its own experience in evaluating information developed by others, whether it was the NWRA or the DRBC or PECO. A review of the administrative record shows that information from these various sources was in the file available to the Corps and encompassed in its findings. Perhaps not in detail, but sufficiently so, as to persuade this Court that it would be erroneous to conclude that the Corps acted unreasonably or arbitrary and

capriciously.

With respect to the DRBC, the plaintiffs' claims against the Corps overlap, but to the extent that they do, any discussion with respect to the DRBC will be equally applicable to the Corps. With respect to the Corps, I find that it's actions on the state of this record satisfy the reasonableness test. Because the DRBC entertained and specifically treated the plaintiffs' petition for reconsideration one could analogize that to affording the plaintiffs a hearing.

Therefore, the standard of review in that instance would appear to be the arbitrary and capricious standard as opposed to the reasonableness standard. The arbitrary and capricious standard is usually accorded to a reviewing agency in decisions where there has been an administrative hearing. The reasonable-

ness standard may be more appropriate in reviewing agency action that was taken not pursuant to a hearing or after a hearing or for promulgation of a regulation. In reviewing the assumed claim against the DRBC, I must assume that the claim is being asserted under the Administrative Procedure Act or under - you tell me, Mr. Sugarman. Under what statute or regulation are you proceeding as to the DRBC?

MR. SUGARMAN: It's under common law, Your Honor.

MR. GOLDBERG: Your Honor, if I may, the U.S. Administrative Procedure Act specifically of the DRBC's compact is not applicable to it and that fact is so noted in Judge VanArtsdalen's opinion. So, we are not governed by that procedure specifically.

THE COURT: All right. I will look at the claim against the DRBC in

terms of whether or not the DRBC acted reasonably or arbitrarily and capriciously, because I am satisfied that under those tests, no matter how the plaintiffs might be proceeding, injunctive relief is not appropriate. Judge VanArtsdalen found, and I agree, that the DRBC has particular expertise to which the Corps could defer to the DRBC as lead agency to determine all locations of water, the need for water and the management of the river. The Delaware River is a managed flow river. All agree. The DRBC has the exclusive responsibility for the management of this river and water in the basin. The thrust of plaintiffs' charges as to DRBC, is that given its analysis of river flows, that the 3000 CFS objective at Trenton is unreasonable and known to be a mirage by the DRBC for purposes of the Point Pleasant project.

In short, plaintiffs argue that DRBC acknowledges that there's not enough water in the river and that any diversions without augmented flows from dams or reservoirs to be constructed in the future, will be detrimental to marine life, to the fishing industry and all of the objectives with respect to salinity control, dissolved oxygen and the like.

The plaintiffs' arguments on this record overlook several important factors with respect to the level B studies, the salinity studies and the good faith negotiations. First, the level B study, that's not taking into consideration in its analysis that there would be no controls by PECO if the flows are below 3000 CFS in terms of future projections, nor the management ability of DRBC with respect to the withdrawal by NWRA in times of low flow, nor is there plaintiffs' evidence or argument which

considered the fact that the level B report states, I believe, that given existing storage capacities, there is still 110 CFS available for allocation, nor does the plaintiffs' argument take into consideration that the diversion at Point Pleasant would result in consumptive loss of only 8 CFS. To equate the effects of withdrawal of 95 MGD with a consumptive loss of 95 MGD, is misleading.

DRBC has the responsibility to administer the river flows to meet the permanent application requirements and restrictions as well as one of the public needs served by the river.

Mr. McCoy's presentation basically was a challenge to DRBC or an attempted challenge to DRBC to fulfill its commitments; that is through good faith. This Court is not in a position from this record to place suspicion on

the ability of DRBC to manage the river nor would it be appropriate for this Court to in effect attempt to manage the river for the DRBC. Its management abilities with respect to PECO and NWRA would reasonably appear to give it the manageability to control the withdrawal of those applicants in accordance with the good faith negotiations results, whatever they may be, which as I understand it from the material reviewed will be to look at the drought of the '60's as the drought of record as a plateau, the record suggests that the drought of the '60's is recurrent on 100 to 300 years as opposed to the drought of the '30's, that occurs maybe once every ten years.

Plaintiffs allege, among other things, that the DRBC has already put into effect the recommendations from the good faith on negotiations with respect

to the draw down of water from New York storage unit and hence, argues the plaintiffs their must be a bad faith attempt undertaking to ramrod into effect all the other recommendations, including a relaxation of the salinity objectives.

The record shows, however, that the good faith negotiation recommendations are subject to public hearing and comment and that is an ongoing process, and hence, there is no room for this Court to find, on this record, that there has been a relaxation in fact of the salinity objective.

This Court is not the proper forum for an attack on the proposed salinity level, if there is any change, that should be done through the proper administrative procedures available to plaintiffs or others through the DRBC.

I have reviewed that the plaintiffs' objections raised to the DRBC and

the responses to each. In light of the record before the DRBC or that as considered by the DRBC through its own contractors or supplied through studies contracted for through the NWRA. I do not find any reason to conclude that in denying the plaintiffs' petition for reconsideration, the DRBC acted arbitrarily, capriciously or unreasonably.

I could go through each of these in terms of the objections and the responses on this record but I will not.

I have studied the objections and I have studied the responses and found in the record support for the responses.

Based upon independent findings and discussions here, the Court adopts and incorporates in this bench opinion the following proposed findings of facts as prepared by NWRA, because they are

consistent with the Court's foregoing findings.

The Court adopts 1 through 25; 27 through 40, those are background historical as to which there should be no objection.

41 through 65. 66 through 76. 77 through 82. 83 through 116. 117 through 134. 135 through 147. 148 through 150.

I find that those findings of facts are supported by the record evidence available to the Corps and the DRBC.

Plaintiffs final argument with respect to all of the agency defendants and NWRA and PECO is that there was a commitment to the Point Pleasant location such that the Corps merely rubber stamped the desire of the NWRA and PECO to use the Point Pleasant site because it was titled to NWRA and that thereafter all of

the efforts of the Corps amounted to no more than going through the motions and was not a good faith environmental assessment.

The plaintiffs suggest that the hiring or the contracting of Miss Mintz was designed to result in a historical district whose boundaries would not include the bluff or the esthetic charm of the village as opposed to selecting the Bucks County Conservancy as advisor on the historic certification because or whereas the later had a broader sense of the boundaries of the historic district.

I find that the record shows that the Bucks County Conservancy took the position that it was unavailable as a contractor to complete the project within 30 days, Miss Mintz was.

The plaintiffs argue that Miss Mintz did not consult with the Bucks

County Conservancy.

It is apparent from the record that the Bucks County Conservancy did review and critique Mintz' report evaluation. The Court submitted to the Advisory Council both the Mintz report as well as the Bucks County Conservancy's critique comments of the Advisory Council had both Mintz' report and the Bucks County Conservancy's views as well as the views of the State Historical Preservation officer in determining the extent of the boundary of the historic district.

Plaintiffs argue that Colonel Baldwin refused to meet with representatives of Delaware on site. The record does not support the view of Colonel Baldwin as one who took the tact of avoiding contact with the public or with the plaintiffs; the record does show meetings with counsel of Delaware and Colonel Baldwin and Colonel Baldwin

acting as a moderator on a public hearing of the project.

I do not regard, based upon what I reviewed in the record, the Corps' correspondence with the Fish and Wildlife Service as being arbitrary and capricious.

The Wildlife Service did not specify the bases of its objections to the project with any backup data. It's speculative positions did not raise any concerns not already addressed by the Corps.

Its request for information are puzzling, inasmuch as it had as much access to the DRBC information as did the Corps with respect to impact on biotics. Likewise, it had access to the NWRA material. It did not conduct any independent studies. The oxygen demand and segmentation appears to have been a

factor considered by the DRBC and the NWRA in the dissolved oxygen studies in respect to the flows in the river. I do not observe that the Fish and Wildlife Service took the position in the case before Judge VanArtsdalen that the project was bad, but did not raise any issue then which was not considered and studied to Judge VanArtsdalen's satisfaction by the Corps.

As Judge VanArtsdalen found there, just because one agency has a difference of mind with the permitting agency, is not a basis for saying that an environmental impact statement is required. In considering whether or not the plaintiffs have borne their burden of proving entitlement to injunctive relief, the Court must consider whether or not the plaintiffs will suffer irreparable harm if relief is not granted, or whether the defendants will be harmed if relief

is granted, whether the public, generally, will be harmed if relief is granted and whether the plaintiffs are likely to prevail on the merits of the claim.

I have found that considering the evidence before me, that the plaintiffs have not shown that they are likely to prevail on the merits of the claim. I have considered whether or not the construction in the Delaware River or environs should be enjoined until such time as the NRC acts or the Corps acts upon the rechannelization project in terms of permitting or not. The PUC has determined Limerick I's construction is in the best interest of the public and it has directed that PECO complete that construction at the earliest possible time consistent with public safety. The requirements placed upon the applicant

NWRA by the Pennsylvania DER is to complete all construction by the end of 1984. The work in the river has to take place within a specified time during any winter, reducing the period of time that can be devoted to construction and with construction with deliberateness, with a view towards public safety and compliance with the minimization of loss of water in transport. The DRBC has determined a need for water in Bucks and Montgomery Counties, based upon the experience in 1980 and 1981 of water problems in those areas with wells running dry.

Balancing the harm that would occur to the public if the project is not available mechanically for the supply of water to Delaware and Montgomery Counties through NWRA to supplement the well water and considering the harm to the public if the Limerick I is not available for operation on time because of the lack of

completion of the mechanical project, versus the harm to the river, to the canal, to the environs, including the bluff, I find that on balance, the public would suffer more harm if the project presently is enjoined than if it continues. One, there is no harm to the river presently if there is construction. Two, the work under the canal will benefit the canal in terms of its ultimate strength, according to the Pennsylvania Authorities. Three, there is an architect available there and there are procedures outlined for the photographing and replacement of each aspect of the canal dirt or stones removed. The piping is intended to be underground. The effect on the wetlands will be minimal and of no significant impact and that really has not been pressed as an issue here and the harm to the bluff with blasting will be

subject to the same conditions as blasting in the district. The pipes will be underground and covered. I agree with plaintiffs that if they have shown that there was a significant environmental impact that has been swept under the rug, then, that would be sufficient to show irreparable harm.

Here, it is not enough to say, well, the NRC has not acted and Limerick might not operate. There is an independent applicant, NWRA, whose needs have independent justification through DRBC.

Are there any points any counsel believe now the Court failed to consider in its opinion?

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED,	:	CIVIL ACTION
INC., et al.	:	
	:	
V.	:	
	:	
ROGER M. BALDWIN,	:	
et al.	:	NO. 82-5115

BENCH OPINION CORRECTION SHEET

AND NOW, this 23rd day of
December, 1983, it is hereby ORDERED that
the following correction sheet shall be
incorporated into the court's bench
opinion rendered in this matter on Decem-
ber 15, 1982.

1. P. 1438, line 4 - change
"Section 110" to "Section 10".

2. P. 1439 line 7 - change
"refusal" to relief".

3. P. 1439, lines 9-11 -
delete "the National Historic Preserva-
tion Act," and "and the River and Harbors

Act,". Insert "and" after "Act" on line 10.

4. P. 1439, line 15 - after "Harbors Act," add "see California v. Sierra Club, 451 U.S. 287 (1981), and,".

5. P. 1439, line 17 - after "Court" add "in Middlesex City Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1. (1981),".

6. P. 1439, line 24 - change "beliefs" to "briefs".

7. P. 1440, line 10 - after "case" add "619 F.2d 231 (3d Cir. 1980, cert. denied, 449 U.S. 1096 (1981),".

8. P. 1440, line 15 - change "agreed" to "aggrieved."

9. P. 1440, line 25 - change "study." to "statement."

10. P. 1443, line 20 - delete "have".

11. P. 1443, line 22 - change "the reasonableness" to "either".

12. P. 1444, line 1 - delete
"a matter of record of".

13. P. 1444, line 8 - after
"decision," add, 536 F. Supp. 26 (E.D.
Pa. 1981), aff'd, 681 F.2d 805 (3d Cir.
1982)."

14. P. 1445, line 24-25 -
change "Advisory Council on Historic
Preservation" to "keeper of the National
Registry".

15. P. 1446, line 1 - add
after "was", "determined to be."

16. P. 1446, line 9 - substi-
tute "Corps," for "DRBC,".

17. P. 1446, line 13 - after
"110(f)," add "of the National Historic
Preservation Act,".

18. P. 1446, delete lines 15-
16 - add "undertake to the maximum extent
possible, such planning and actions as
may be necessary to minimize the harm to

national landmarks."

19. P. 1446, line 17 - delete
"assert".

20. P. 1447, line 4 - change
"channel," to "canal,".

21. P. 1447, line 11 change
"out" to "without".

22. P. 1447, line 24 - add
"water" before "for".

23. P. 1448, line 7 - after
"case," add "401 U.S. 402 (1971)."

24. P. 1448, delete line 11 -
change "be" to "the".

25. P. 1448, delete line 17-18
and substitute "steps would minimize the
harm to the historic landmark."

26. P. 1449, line 7 - change
"appropriatness" to "appropriateness".

27. P. 1450, line 25 - add
after "consumption," "assuming that the
River flow is less than 3000 cfs."

28. P. 1451, line 1 - change

"gages." to "guages."

29. P. 1451, line 2 - delete
"that".

30. P. 1451, line 7 - delete
"or at" and "mouth". Add after "above",
"Philadelphia and 50 percent through".

31. P. 1451, line 18 - delete
"available to the Corps."

32. P. 1452, line 2 - delete
"is"; line 13, substitute "is" for "are".

33. P. 1452, lines 14 and 15 -
end sentences with "millimeters." and
"fish."

34. P. 1453, line 8 - end
sentence with "species."

35. P. 1453, line 9 - after
"Commerce" add "(National Marine Fisheries Service)".

36. P. 1453, line 10 - substitute
line 10 with "not endanger the species in the river. Further, it made a

determination".

37. P. 1453, line 11 - add "a"
after "constitute".

38. P. 1453, line 14 - end
sentence with "flow." Substitute "to
what" with "it was based on what".

39. P. 1455, line 21 - change
"reasonable" to "reasonably".

41. P. 1455, line 22 -
reverse order of words "engineering-wise"
and "unsound".

42. P. 1455, line 25 - after
"NWRA" substitute "has an" for "and".

43. P. 1456, line 14 - end
sentence with "submission".

44. P. 1456, line 19 - delete
"too".

45. P. 1456, line 24 - change
"review" to "reviewed".

46. P. 1457, line 14 - change
"at" to "that".

47. P. 1458, line 8 - add

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"water" after "taking".

48. P. 1458, line 12 - delete
"and"; place period after "Schuykill";
line 13 - start next sentence "Those . .
." and connect with sentence in line
14, stopping at "diversion" on line 16;
start next sentence "Now," line 16; p.
1458, line 20 - substitute "and the
reliability of" for "of the liability,".

49. P. 1461, line 8 - end
sentence after "study" and substitute
"that's not taking" with "They do not
take".

50. P. 1461, line 9 - substi-
tute "in its" with "DRBC's".

51. P. 1461, line 10 - change
"controls" to "withdrawals".

52. P. 1461, line 12 and 16 -
end sentences with "flow." and "alloca-
tion." respectively.

53. P. 1461, line 18 - add
after "CPS," "assuming that the River

flow is less than 3000 cfs."

54. P. 1462, line 12 - end
sentence with "plateau."

55. P. 1462, line 18 - delete
"on".

56. P. 1462, line 20 - change
"their" to "there" and add "or" after
"attempt".

57. P. 1464, line 23 - change
"later" to "latter."

58. P. 1466, line 11 - delete
"do not".

59. P. 1466, line 22 - change
"suffere" to "suffer".

60. P. 1472, line 11 - delete
"not been" and substitute "to be".

61. P. 1477, line 14 - delete
"from" and substitute "if". Line 17,
change "Section 111(f)" to "Section
110(f)"

62. P. 1479, line 21 - add
"stated" after "specifically".

63. P. 1481, line 20 - change
"scaring" to "scarring".

64. P. 1482, line 22 - change
"log," to "long,".

65. P. 1487, line 7 - change
"That's" to "That".

66. P. 1487, line 15 - change
"filed" to "final".

67. P. 1488, line 7 - change
"fine," to "find,".

68. P. 1490, line 13 - change
"my" to "by".

The standard of review, scope of hearing and evidentiary rulings made during the course of the preliminary hearing, are incorporated herein by reference. The administrative record of the Corps, all of which was reviewed, is hereby marked and made "Court Exhibit 1."

BY THE COURT:

/S/ James J. Giles
J.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., :
et al., :
Plaintiffs : CIVIL ACTION
: No. 82-5115
v. :
: :
BALDWIN, et al., :
Defendants.: :

FINDINGS OF FACT
(Proposed By NWRA and Adopted
By The Court).

I. HISTORY OF PRIOR ACTIONS, ENVIRON-
MENTAL REVIEWS AND APPROVALS

1. A water study of the Neshaminy Creek Basin was undertaken under the co-sponsorship of the predecessor to Pennsylvania Department of Environmental Resources, the U.S. Soil Conservation Service, Bucks County and Montgomery County. As a result, the Neshaminy Creek resource plan was developed. This study included recommendations to construct, inter alia, a Point Pleasant Pumping Station, a taking point for water supply

purposes at Chalfont, and ten dam structures along the Neshaminy Creek, including the dam that had created Lake Galina. (NWRA Exhibits 13, p. 14).

2. On October 26, 1966, the Watershed Project for Neshaminy Creek was approved by the Delaware River Basin Commission and was added to the Delaware River Basin Comprehensive Plan. The decision was supplemented on January 25, 1967, by adding the entire multi-purpose project as described in the 1966 Water Resources Study to the DRBC Comprehensive Plan. (Neshaminy Creek Watershed Project, Bucks and Montgomery County, Pennsylvania, DRBC Docket No. D-65-76CP and Bucks and Montgomery County Commissioners, Neshaminy Creek Water Shed Project, Bucks and Montgomery Countys, Pennsylvania, DRBC Docket No. D-65-76CP(2), NWRA Exhibit 13, pp. 14-15).

3. On December 8, 1970, the Pennsylvania Water and Power Resources Board issued to Bucks County Water Allocation Permit No. WA-649 authorizing the withdrawal of Delaware River water for public water supply purposes. (NWRA Exhibit 13, p. 15).

4. On March 17, 1971, the DRBC amended its Comprehensive Plan to include an enlarged Point Pleasant Pumping Station to supply additional amounts of water for public water supply and, in addition, to provide water to PECO for Limerick. This amendment was a result of a feasibility study prepared in 1970 at the request of DRBC. (NWRA Exhibit 13, pp. 15-16).

5. In February, 1973, DRBC completed and submitted to the counsel on Environmental Quality the Environmental Impact Statement on the Point Pleasant Diversion Plan, a project which included

the withdrawal of up to 150 million gallons per day (mgd) of water from the Delaware River at Point Pleasant to be conveyed to the Chalfont Water Treatment Plant and to Limerick. (Final Environmental Impact Statement on the Point Pleasant Diversion Plan, Bucks and Montgomery Countys, Pennsylvania, NWRA Exhibit 13, p. 16).

6. DRBC concluded in its Final Environmental Impact Statement that the proposed project would be beneficial to the Neshaminy and Perkiomen Watersheds and not detrimental to the Delaware River Basin. (NWRA Exhibit 13, p. 16).

7. In January, 1977, Bucks County completed a study of water supply needs of Central Bucks County and the alternatives for meeting those needs. The study concluded that the Neshaminy Water Supply System was the best over all. (Central

Bucks County Water Supply Study, NWRA Exhibit 13, p. 16).

8. In February, 1977, Montgomery County completed a study of the water supply needs in Central Montgomery County and the alternatives for meeting those needs. Said study concluded that the Neshaminy Water Supply System was the best overall. (Water Supply Study Montgomery County, NWRA Exhibit 13, p. 16).

9. In March, 1977, the Delaware Valley Regional Planning Commission completed its Interim Population Projection Report including, therein, projections for the population by the year 2000 in Central Bucks and Central Montgomery Countys. (Interim Projections Report for Bucks, Chester, Delaware, Montgomery, Philadelphia Countys, Pennsylvania, NWRA Exhibit 13, p. 16).

10. In conjunction with the results of the three last-referenced reports, NWRA initiated the preparation of its Environmental Report which included re-evaluation of the Neshaminy Water Supply Project as described in the DRBC Comprehensive Plan and an evaluation of the information contained in the DRBC Environmental Impact Statement on the Point Pleasant Diversion Plan. In conjunction with the preparation of this Report, NWRA drew on the expertise of aquatic biologists, environmental engineers, archeologists and other consultants. (NWRA Exhibit 13, p. 17).

11. On the basis of the above-referenced studies and reports, the designed capacity of the Treatment Plant at Chalfont was selected to remain at 20 mgd for the initial installation; however, the ultimate capacity of the Treatment Plant was reduced from 80 to 40

mgd to meet the supplemental water needs of the service area of Central Bucks and Montgomery Countys. (NWRA Exhibit 13, p. 16).

12. In September of 1978, NWRA submitted to the Department of Environmental Resources an application for a modification to the Water Allocation Permit along with an updated report. The report concluded that there is a need for less supplemental water supply than originally projected in 1970. (NWRA Exhibit 13, p. 17).

13. In November, 1978, the Department of Environmental Resources issued Water Allocation Permit No. 0978601 to NWRA, superseding the originally issued Water Allocation Permit. This Permit was issued together with an exhaustive report prepared by the Department of Environmental Resources supporting and justifying the issuance of the new permit. The

new permit granted NWRA, under certain conditions, the right to withdraw water from the Delaware River at Point Pleasant as well as from Pine Run and North Branch of Neshaminy Creek to provide up to 40 mgd of potable water to Central Bucks and Central Montgomery Countys. This potable water would supplement the existing limited groundwater supplies. (DER Water Allocation Report, November 1, 1978, NWRA Exhibit 13, p. 17).

14. Concurrent with all of the above-mentioned reviews of the basic Point Pleasant Project and Neshaminy Water Supply System, the Atomic Energy Commission completed the preparation of its Final Environmental Impact Statement on the Limerick Generating Station which incorporates, by reference, the Environmental Impact Statement prepared by the DRBC. (Final Environmental Impact Statement relating to the proposed

Limerick Generating Stations, Units I and II, Philadelphia Electric Company, NWRA Exhibit 13, pp. 17-81).

15. Based on the Final Environmental Impact Statement prepared by the Atomic Energy Commission, the previous Environmental Impact Statement prepared by the DRBC, and the records compiled at public hearings held before the Atomic Safety and Licensing Board and the Appeal Board of the Nuclear Regulatory Commission, the Nuclear Regulatory Commission issued to Philadelphia Electric Company construction permits for the Limerick Plant in March, 1975. (In the Matter of Philadelphia Electric Company (Limerick Generating Station, Units I and II), Docket Nos. 50-352 and 50-353 (March 19, 1975), NWRA Exhibit 13, p. 18).

16. An appeal was taken to the Third Circuit Court of Appeals and they decided, inter alia, that the

Environmental Impact Statement prepared by the Atomic Energy Commission and DRBC met the requirements of the National Environmental Policy Act. (Environmental Coalition of Nuclear Power, et al. v. NRC, Docket No. 75-1421 (November 12, 1975), NWRA Exhibit 13, pp. 18-19).

17. In February 1979, NWRA issued its draft Environmental Report. (NWRA Exhibit 14).

18. On May 30, 1979, NWRA held public hearings on its draft Environmental Report. (NWRA Exhibit 14).

19. On July 5, 1979, NWRA filed its application for Section 3.8 approval under the Delaware River Basin Interstate Compact with DRBC which was accompanied by its Environmental Report, the transcript of the Public Hearing of May 30, 1979, and a report prepared by NWRA responding to the comments received at

the May 30, 1979 Public Hearing. (NWRA Exhibit 13, p. 20).

20. When NWRA filed its application for Section 3.8 approval with DRBC, DRBC had available to it three Final Environmental Impact Statements, together with all the supporting data. They were: (1) "Point Pleasant Diversion Plan, Bucks and Montgomery Countys," prepared by DRBC in 1973; (2) "Limerick Generating Station, Units I and II," prepared by the Atomic Energy Commission in 1973; and (3) "Neshaminy Creek Water Shed," prepared by the U.S. Department of Agricultural, Soil Conservation Service in 1976. (NWRA Exhibit 13, p. 20).

21. In February, 1980, pursuant to the Rules of Practice and Procedure §2-4.3, DRBC issued its Environmental Assessment of the Neshaminy Water Supply System and related components and, at the same time, the Executive Director issued

a notice of his intent to issue a "Negative Declaration." DRBC invited public comment to these documents. Notice of the Executive Director's intent was forwarded to all relevant federal and state agencies; also notice of the Executive Director's action was given at the DRBC public meeting of March 10, 1980. (NWRA Exhibit 13, pp. 20-21).

22. In August, 1980, pursuant to DRBC's Rules of Practice and Procedure, §2-4.4, DRBC issued its Final Environmental Assessment for the Neshaminy Water Supply System including the issuance by the Executive Director of a "Negative Declaration." Public notice of his recommendation to issue a "Negative Declaration" was sent to all the relevant state and federal agencies; also, said action was announced at the DRBC public meeting of August 27, 1980. (NWRA Exhibit 13, pp. 20-21).

23. On November 18, 1980, pursuant to public notice and DRBC's Rules of Practice and Procedure, §2-1.5, a public hearing was held on DRBC's proposal to amend its Comprehensive Plan and to grant Section 3.8 approval under the Interstate Compact to NWRA and PECO to construct the components of the Neshaminy Water Supply System. (NWRA Exhibit 13, p.21).

24. On February 18, 1981, DRBC authorized an amendment to the Comprehensive Plan and granted the Section 3.8 applications of both PECO and NWRA, subject to certain expressed conditions and limitations. (NWRA Exhibits 2 and 3).

25. The actions taken by DRBC in February, 1981 were reviewed by the U.S. District Court, Eastern District of Pennsylvania, in the matter of Delaware Water Emergency Group, et al., v. Gerald M. Hansler, et al., 536 F.Supp. 26 (E.D.

Pa. 1981). The primary issue before the court was whether the DRBC had fully and fairly considered the environmental impact of the proposed project in conformity with the National Environmental Policy Act of 1969.

26. Not adopted by the Court.

27. On Appeal to the Third Circuit Court of Appeals, the Third Circuit affirmed, without opinion, Judge VanArtsdalen's decision. (Delaware Water Emergency Group, et al. v. Gerald M. Hansler, et al., 681 F.2d 805 (3d Cir. 1982)).

28. Following a preliminary meeting among PECO, NWRA and the U.S. Army Corps of Engineers Staff (Corps), by letter dated September 8, 1980, PECO and NWRA provided to the Corps a joint submission describing the Point Pleasant Pumping Facilities and Associated Systems. Said submission provided detailed information of all facilities including the treatment

plant and all transmission mains.
(Plaintiffs' Exhibit 15 and 60).

29. By letter dated October 28, 1980, after review of all material submitted by PECO and NWRA, the Corps advised PECO and NWRA that it had determined that two (2) permit applications were to be submitted; one (1) for the Pine Run rechannelization and one (1) for the Point Pleasant intake structure. All other facilities were covered by the "nationwide" permit program.

30. As a result of the Corps directive, in December, 1980, NWRA applied to the U.S. Army Corps of Engineers for a permit (Application No. NAPOP-F-800534-3) to construct a water intake structure in the Delaware River and under the Pennsylvania Canal at Point Pleasant and for a permit (Application No. NAPOP-R-80-813-3) to rechannel a portion of Pine Run adjacent to the site

for the water treatment plant. (Corps of Engineers, Exhibit 5).

31. On April 6, 1981, the Corps issued a public notice that NWRA had applied for the above-referenced permit. (Corps of Engineers Exhibit 3, p. 1).

32. On August 10, 1981, the Corps issued a notice of public hearing concerning NWRA's application for permits and scheduled said hearing for September 15, 1981. (Corps of Engineers Exhibit 2, p. 8).

33. On September 15, 1981, a public hearing was held on the NWRA applications at the Bucks County Community College, Newtown Township, Pennsylvania. The public hearing was attended by approximately 1000 concerned persons. (Corps of Engineers Exhibit 2, p. 8).

34. A record of the public hearing was prepared and notice of its

availability was published on January 11, 1982. (Corps of Engineers Exhibit 2, p. 8).

35. The Commonwealth of Pennsylvania, Department of Environmental Resources, in conjunction with its evaluation of NWRA applications for, inter alia, the water intake structure, prepared an "Environmental Assessment." (NWRA Exhibit 13).

36. Said Environmental Assessment was issued in August of 1982 contemporaneously with the issuance of permits to NWRA and PECO. (NWRA Exhibit 13).

37. Said Environmental Assessment was forwarded to the Corps and reviewed by the Corps. (Corps of Engineers Exhibit 2).

38. On October 14, 1982, the Corps of Engineers issued an Environmental Assessment in conformity with the National Environmental Policy Act of 1969.

(Neshaminy Water Resources Authority, Point Pleasant Diversion Project, Point Pleasant, Bucks County, Pennsylvania, Environmental Assessment, Corps of Engineers Exhibit 3).

39. The Environmental Assessment prepared by the Corps concluded, inter alia, that the issuance of a \$10/404 permit did not constitute "major federal action" and that the installation of the water intake, conduit and pumphouse will not "significantly effect the environment." (Corps of Engineers Exhibit 3, pp. 17-18.)

40. On October 25, 1982, the U.S. Corps of Engineers issued permit No. NAPOP-R-80-534-3 to NWRA permitting NWRA to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania. (Corps of Engineers Exhibit 2).

II. THERE HAVE BEEN NO SIGNIFICANT CHANGES IN THE POINT PLEASANT PROJECT OR SURROUNDING ENVIRONMENTAL CIRCUMSTANCES SINCE JUDGE VANARTSDALEN'S DECISION IN DELAWARE I.

A. There will be No Adverse Impact on Fish and Aquatic Biota From The Change in the Location of the Intake Structure.

41. A 1978 Report prepared by RMC Corporation and the NWRA Environmental Report prepared in 1979 evaluated the effect that a shore line intake would have on the aquatic life in the Delaware River. (N.T. 206, NWRA Exhibit 14).

42. The Environmental Assessment prepared by DRBC in February of 1980 concluded that such a shoreline intake would not cause a significant impingement or entrainment of aquatic life and as a result there would be no significant adverse effects. (DRBC Exhibit 3, page 2-37, 2-38).

43. During the pendency of the DRBC evaluation of NWRA's pending 3.8

application, a report was submitted by NWRA to DRBC entitled "Biological Evaluation of the Proposed Water Intake in the Delaware River at Point Pleasant, Pennsylvania." Said report was prepared by P.L. Harmon of the Pottstown Ecological Laboratories. (Harmon, 1980 Report, NWRA Exhibit 35).

44. The Harmon 1980 Report evaluated the effects of a wedge-wire intake structure located 200 feet from the Pennsylvania shore on all forms and stages of aquatic life located in the area of Point Pleasant; the evaluation included an analysis of the impacts on all stages of American Shad, from the larvae stage up to adult. For purposes of his evaluation, he assumed it was a nursery and spawning area for shad. (NWRA Exhibit 35 pp 8-12).

45. The Harmon 1980 report concluded that the wedge-wire intake will

effect a marked reduction in potential entrainment and impingement losses of aquatic life when compared to a conventional travelling screen design (shore-line intake). The operation of the proposed intake will not result in biologically significant impacts of the resident or migratory fish populations (NWRA Exhibit 35 p. 1).

46. At the time of the approval of the Docket Decision D-65-76 CP (8) by DRBC in February 18, 1981, DRBC engineering division and environmental unit staff had already reviewed the intake design change. (NWRA Exhibit 34; NWRA Exhibit 3, p 8).

47. The only environmental impact not considered by DRBC of the intake structure on aquatic life was the effect said intake structure would have on shortnosed sturgeon. The existence of shortnosed sturgeon eight miles

downstream from Point Pleasant was not determined until after the completion of the DRBC Environmental Evaluation. (Delaware I p. 46).

48. Subsequent to the DRBC Environmental Evaluation, NWRA proposed to extend the intake structure further into the river where velocities are greater. It was proposed to extend the intake an additional 45 feet into the river. (NWRA Exhibit 5).

49. The flow velocities of the river 245 feet from shore are greater than those velocities 200 feet from shore (NWRA Exhibit 6; NWRA Exhibit 35 p. 15).

50. Based upon a review of velocity measurements and the river contours, the back eddy in the river extends out 150-160 feet from the west bank. (NWRA Exhibit 4, Exhibit 6 and Exhibit 35).

51. The Fish and Wildlife Service concluded, in a letter dated March 26,

1982, that the location of the intake 45 feet farther out into the Delaware River and use of Johnson wedge-wire screens with a maximum inflow velocity of .5 feet per second and 2mm spacing will reduce localized adverse affect on the fishery. If a flow greater than 2,000 cfs can be maintained in the river at Point Pleasant, Fish and Wildlife Service expects very little negative effect on flow patterns in the back eddy caused by the change in the location of the intake structure (NWRA Exhibit 4 and DRBC Exhibit 16).

52. Even under the worst possible case conditions, the effect on aquatic life of a maximum withdrawal of 95 mgd, at a river flow of 2,500 cfs, will be practically nil. (NWRA Exhibit 7).

53. The eddy area is located at least 62 feet shoreward of the intake

structure, at least 62 feet away from the intake location. (NWRA Exhibit 10).

54. Upon the completion of review by the Corps' Hydrology-Hydraulics Branch of materials submitted by Del-AWARE and by GKY and Associates, Inc., it concluded that the subject report does not provide any substantive or significant arguments for requiring additional investigation. Further, it was concluded that said reports tended to reveal a bias. (NWRA Exhibits 8, 9, and 10).

55. There is substantial and reasonable evidence in the record to support the Corp's conclusion that the proposed intake alignment intercepts the actual river channel and thus the main river at about a right angle and approximately 800 feet downstream of the mouth of the Tohickon Creek. (Corps of Engineers Exhibit 2 p. 20).

56. The maximum intake velocity of the intake structure will be .5 feet per second only when the maximum 95 mgd is being withdrawn. The average intake velocity, at that time, is .35 feet per second, and as the amount of water withdrawn reduces, the intake velocity reduces in a linear relationship. (NWRA Exhibit 7 and Plaintiff Exhibit 66).

57. The average flow velocity toward the screens, at 1 foot away from the the screens, at the maximum rate of withdrawal, will only be approximately .1 feet per second. (Plaintiffs' Exhibit 66 p. 3).

58. When DRBC is not able to achieve a flow at Trenton of 3,000 cfs through the management of water stored within the Basin complementing natural flows, only water for public water supply purposes will be able to be withdrawn at Point Pleasant until PECO is able to

provide its own storage facilities.

(DRBC Exhibit 1 and 9, NWRA Exhibits 1, 2, and 3).

59. When flows are below 3,000 cfs, it is highly unlikely that NWRA will be able to withdraw the maximum amount it is allowed to withdraw for public water supply, 49 mgd, due to numerous factors, including DRBC Regulations and Conditions included in Docket Decision No. D-65-76CP(8), (NWRA Exhibit 3, Condition Y and Z, NWRA Exhibit 7, DRBC Exhibit 9, DRBC Exhibit 1).

60. NWRA will not be able to withdraw the maximum amount for public water supply purposes unless such withdrawals are subsequently approved by DER through subsidiary water allocation permits (NWRA Exhibit 13, p. 65).

61. There was substantial evidence in the Corps record for it to conclude that the withdrawal of water as permitted

and regulated by the DRBC will have no significant adverse impact on the Delaware River System. Withdrawal of water, even during low flow conditions, will result in no significant adverse impact on aquatic organisms due to entrainment and impingement; such intake represents the "State of the Art" technology with respect to intake structure design. (Corps of Engineers Exhibit 2 p. 15).

62. If, under unforeseen circumstances, an adverse impact upon aquatic life is noted, both DRBC and DER will require such corrective action as appropriate to mitigate such impact. (NWRA Exhibit 13, p. 32, NWRA Exhibit 3, Condition M).

63. No significant dangers are anticipated as a result of the backwashing of the intake structure (NWRA Exhibit 11).

64. The minimum surface elevation at a flow of 3,000 cfs is in excess of 70 feet and thus there will be at least a minimum of 4 feet of water between the top of the intake and the surface of the river at 3,000 cfs (NWRA Exhibit 5, Plaintiffs' Exhibit 66).

65. There is substantial evidence in the record to support DRBC conclusion that the design changes in the intake structure should reduce the degree of adverse biological impact from that already approved as of February, 1981. (p. 11, Staff Response, DRBC Exhibit 1).

B. No Significant Impact Will Be Caused On The Dissolved Oxygen Levels Or On The Salinity Levels In The Delaware River As A Result Of The Withdrawals At Point Pleasant.

66. There have not been any substantial changes in circumstances from February 18, 1981, that would cause any difference in the impacts caused by the

withdrawals of water from Point Pleasant upon the dissolved oxygen and salinity levels in the Delaware River. (DRBC Exhibit 1: DRBC Resolution #82-22 and Staff Response to Petitioners' Factual Allegations of 9/24/82).

67. DRBC concluded in February, 1981, based upon its analysis of the affects of withdrawals, including materials contained in the Level B Study, that the effects of withdrawal at Point Pleasant when flows at Trenton are 3,000 cfs or lower, on salinity levels would be virtually immeasurable. (DRBC Exhibit 3, p. IV-16, DRBC Exhibit 1, p. 3 of Staff Response, NWRA Exhibit 13, p. 84).

68. Because there is no change in the rate of withdrawal projected by NWRA or the use of the water as projected by NWRA from that which was proposed in 1981 and, further, in light of the fact that there is no change in the circumstances

concerning the flow of Delaware River water, the impacts on salinity, as evaluated in 1981, are unchanged. (DRBC Exhibit 1).

70. The withdrawal of water at Point Pleasant will not affect the shad runs because the dissolved oxygen levels are substantially reduced at approximately river mile 93 based upon pollution discharges to the Delaware River which have a significant impact on the dissolved oxygen levels. (DRBC Exhibit 2).

71. The dissolved oxygen model used by DRBC did consider the effects of accumulated sediment deposits. (DRBC Exhibit 2, p. 26).

72. It is not possible to significantly ameliorate the impacts of pollution loads upon dissolved oxygen concentration throughout the estuary by releasing stored water, because of the vast

amounts required to have a significant impact. (DRBC Exhibit 2, p. 76).

73. Only 3% of the time, since 1971, has the flows in the Delaware River been below 3,000 cfs. (Staff Response, p. 3, DRBC Exhibit 1).

74. There has been no change in the amounts of water to be withdrawn at Point Pleasant, the use of the water to be withdrawn, or the flows in the Delaware River from those considered in 1981. (DRBC Exhibit 1).

75. There is substantial evidence in the record to support the Corp's conclusion that the withdrawal of water as permitted and regulated by the Delaware River Basin Commission will have no significant adverse impact on the Delaware River System. The project, with conditions imposed by the DRBC, will have no significant affect on salinity intrusion of well fields and surface

water users of the Delaware River. Withdrawal of water, even during low flow conditions, will have a biologically insignificant effect on downstream dissolved oxygen concentrations. (Findings of Fact p.15, Corps Exhibit 2).

76. Flows in the East Branch Perkiomen Creek and North Branch Neshaminy Creek will be augmented by the project releases and minimum flows will be maintained under the project operating plan. The natural flow of the streams will not be diminished but will be augmented and enhanced, especially during low flow periods. (NWRA Exhibit 14, pp. V-2-26-V-23; DRBC Exhibit 3, pp.3-39-2-43; 2-51-2-53; and appendix E; NWRA Exhibit 13, pp. 46-59, 89; DRBC Exhibit 1, Staff Response, p. 14).

C. Groundwater Is Not A Viable Or Feasible Alternative To Surface Water Supply.

77. In studies undertaken prior to

February, 1979, it was found that ground-water was inadequate to meet all of the future public water supply needs of Central Bucks and Montgomery Counties. The "no-action alternative" would deprive the residents of these counties of a safe, adequate water supply system and adverse economic and environmental conditions could be anticipated. The most prominent adverse conditions would be the lack of water for domestic, commercial and industrial needs, the drying up of surface water streams of the areas, and the contamination of the groundwater aquifer by over pumping of wells in an attempt to meet the water demands. (Environmental Report on the Neshaminy Water Supply System, Neshaminy Water Resources Authority, February 1979, p. VII-7, NWRA Exhibit 14).

78. In August 1980, the Delaware River Basin Commission concluded that

further development of groundwater was considered the "least desirable water supply alternative" for Central Bucks and Montgomery Countys. (Final Environmental Assessment for the Neshaminy Water Supply System, Delaware River Basin Commission, August 1980, pp. 2-28, DRBC Exhibit 3).

79. In 1980 and early 1981, the Eastern Pennsylvania Region endured a period of moderate to serious rainfall shortages. By March 1981, over 4,000 domestic wells in this region had gone dry as a result of this drought. Four thousand families found themselves without water for essential drinking, sanitation and other domestic uses; costs of replacing these supplies represented an economic loss of over \$6.7 million. (DER Environmental Assessment Report and Findings, Point Pleasant Water Supply Project, August 1982, p. 69, NWRA Exhibit 13).

80. In a special groundwater study of the Middle Delaware River Basin prepared by R. E. Wright Associates, Inc. for the Delaware River Basin Commission, Wright Associates concluded that groundwater withdrawals exceed dry year recharge in large areas of Bucks and Montgomery Counties. (Special Groundwater Study of the Middle Delaware River Basin, R. E. Wright Associates, Inc., July 1982, Vol. III, Chapter XIII, Plaintiffs' Exhibit 14).

81. Based on the information contained in the R. E. Wright Associates Groundwater Study prepared for the Delaware River Basin Commission, the Department of Environmental Resources determined in August, 1982, that further development of groundwater, as an alternative to a supplemental surface water supply, was an unacceptable option for the Central Bucks and Montgomery County

Region. (Environmental Assessment, Report and Findings, Point Pleasant Water Supply Project, Department of Environmental Resources, August 1982, p. 71, NWRA Exhibit 13).

82. In September 1982, the Delaware River Basin re-evaluated the groundwater alternative to the Neshaminy Water Resources Authority Water Supply Project. The DRBC concluded, inter alia, that further development of the groundwater is an unacceptable option for the Central Bucks and Montgomery Counties. (Staff Response to Petitioners' Factual Allegations of September 24, 1982, Allegation 4-H, pp. 17-19, DRBC Exhibit 1).

III. THE U.S. ARMY CORPS OF ENGINEERS FULLY COMPLIED WITH THE MANDATES OF SECTIONS 106 and 110(F) OF THE NATIONAL HISTORIC PRESERVATION ACT.

83. A 1978 report, commissioned by NWRA and written by two University of Pennsylvania Archeologists, Urban and

Schortman, concluded that the Point Pleasant Pumping Station would not adversely effect potential archeological resources or historical resources, including the Delaware Division of the Pennsylvania Canal ("Canal") and the Village of Point Pleasant, if mitigation procedures as outlined in the report are followed. (Plaintiffs' Exhibit 44, pp. 35-37).

84. NWRA, based upon the Urban and Schortman Report, set forth in its 1979 Environmental Report procedures to be followed for placing of the intake conduit under the Canal, including the on-site presence of an archeologist. NWRA also proposed to design the Pump Station Building in a manner to conform with its surroundings. (NWRA Exhibit 14, Appendix C).

85. DRBC evaluated the Urban and Schortman Report and NWRA's Environmental

Report and concluded that the Point Pleasant Pumping Station would result in no adverse impact upon nearby cultural resources, including the Canal. (DRBC Exhibit 3, pp. 2-34).

86. The designated State Historic Preservation Officer ("SHPO") in Pennsylvania is the Pennsylvania Historical and Museum Commission.

87. After reviewing DRBC's Final Environmental Assessment, the SHPO advised DRBC that the SHPO agreed that the Point Pleasant Pumping Station would have no adverse impact upon archeological resources in the area. The SHPO further said that the Point Pleasant Station would have a technical adverse impact upon the Canal which could be adequately mitigated by archeological monitoring of the project excavation as proposed. (NWRA Exhibit 16).

88. DRBC's approval under Section

3.8 of its Compact was conditioned upon adoption of the measures in Appendix C of NWRA's Environmental Report. (NWRA Exhibit 3).

89. DRBC was advised that consultation with the Advisory Counsel on Historic Preservation ("ACHP") under the National Historic Preservation Act of 1966 would be required in conjunction with review of the Point Pleasant Pumping Station. (NWRA Exhibit 16, Plaintiffs' Exhibit 45).

90. DRBC deferred to the Army Corps of Engineers in conjunction with the latter agency's review of NWRA's permit application for the construction of the intake structure, to act as lead agency for the purpose of consultation with ACHP. (Plaintiffs' Exhibit 45).

91. Upon the recommendation of the SHPO, the Corps commissioned Ms. Elizabeth Mintz to prepare a report on the

proposed Point Pleasant Historic District to be submitted to the Keeper of the National Register in support of request by the Corps for a determination of eligibility of the Point Pleasant Historic District for inclusion in the National Register. (NWRA Exhibit 29-1).

92. On December 15, 1981 the Corps submitted to the keeper of the National Register said report along with its request for determination of eligibility and comments on the report prepared by the Bucks County Conservancy, NWRA and the Pennsylvania Historical and Museum Commission ("PHMC"). (Plaintiffs' Exhibit 48).

93. On December 29, 1981, the Point Pleasant Historic District was determined eligible for the National Register of Historic Places by the Keeper of the Register. Upon receipt of the Determination of Eligibility, the Corps began its

consultation with ACHP in fulfillment of the responsibilities imposed by the National Historic Preservation Act of 1966 and its implementing regulations. (Plaintiffs' Exhibit 49).

94. In the meantime, there was an on-going consultation among the SHPO, NWRA, the Corps and the Heritage Conservation and Recreation Service ("HCRS") to develop plans for the aboveground elements of the Point Pleasant Pumping Station which would either avoid or mitigate any potential adverse effects upon the Village of Point Pleasant.

95. On May 27, 1981, representatives of NWRA, the Corps, SHPO, and the HCRS attended a meeting at the site of the Proposed Point Pleasant Pumping Station at which NWRA's plans for the design of the Pump Station Building and its attendant landscaping were reviewed and approved. (NWRA Exhibit 18).

96. On September 28, 1981, the SHPO formally approved NWRA's plans for the design of the Pump Station Building and its attendant landscaping and advised the Corps that, in the opinion of the SHPO, the proposed structure would not have an adverse impact upon the village of Point Pleasant should it be determined eligible as an historic district. (NWRA Exhibit 19, Appendix F).

97. NWRA's plans for the design of the Pump Station Building and its attendant landscaping were also submitted to the ACHP. (Letter dated January 19, 1982 from E. H. Bourquard to Charlene [sic] Dwin, attached to letter dated March 18, 1982 from Ann A. Nevel to Richard Hassel, Army Corps of Engineers. (Certified Record, Part B).

98. The Corps commissioned Ms. Elizabeth Mintz to prepare a Preliminary Case Report which, when completed, was

circulated, inter alia, to the SHPO, the ACHP and the Bucks County Conservancy. (NWRA Exhibit 19).

99. The Preliminary Case Report included the opinions of the Bucks County Conservancy and of Del-AWARE Unlimited, Inc. as representative of the views of others who had expressed concern about the potential affect of the proposed water intake facilities on historical and archeological resources in the vicinity and stated that those opinions had been noted by the Corps. (NWRA Exhibit 19, p. 15).

100. The Preliminary Case Report was submitted to the ACHP with a determination by the Corps that the Point Pleasant Pumping Station would have no adverse impact upon the Point Pleasant Historic District but would have a technical adverse effect upon the Canal which would be adequately mitigated if N.W.R.A.'s

proposed construction procedures were implemented. (NWRA Exhibit 20).

101. The SHPO praised the Preliminary Case Report, however, reversed its earlier approvals and called for Pre-Construction Archeological Testing and Evaluation at the site. (NWRA Exhibit 21).

102. The ACHP, in conjunction with the Corps and the SHPO, with input from the Bucks County Conservancy and the HCRS, developed a Memorandum of Agreement designed to mitigate or avoid any potential adverse affects that may be caused by the Point Pleasant Pumping Station. The development process included a meeting attended by representatives of Del-AWARE Unlimited, Inc., the Bucks County Conservancy, the Corps, the ACHP, the SHPO and the HCRS.

103. The Memorandum of Agreement was signed by representatives of the Corps,

the SHPO, and the ACHP. The Memorandum of Agreement is an attachment to and a condition of, NWRA's Permit from the Corps. (Corps of Engineers Exhibit 5).

104. In its Preliminary Case Report, the Corps noted that "every effort has been made to minimize harm to the Canal which may result from the present proposal for the location, design and construction of the water intake facilities. In light of the alternatives discussed and mitigation procedures outlined, the present proposal represents the most feasible and prudent course of action." (NWRA Exhibit 19, p. 14).

105. There has been and will be no Federal Funding for the Point Pleasant Station. (NWRA Exhibit 19, p. 17).

106. The Canal is neither federally owned nor federally controlled. (NWRA Exhibit 22).

107. Alternatives to the Neshaminy

Water Supply System as a whole as well as to the Point Pleasant Pumping Station were evaluated and rejected as infeasible by NWRA in the 1979 Environmental Report and by DRBC in its Final Environmental Assessment of 1980. (NWRA Exhibit 19, Appendix D).

108. On June 14, 1982, in response to a report written by Del-AWARE Unlimited, Inc. outlining proposed alternatives to the Point Pleasant Water Diversion Project, NWRA advised the Corps that NWRA and the expert regulatory agencies in their respective reviews and evaluation of the Neshaminy Water Supply System, have long been aware of, have fully studied and evaluated, and have rejected as infeasible, all the alternatives specifically suggested by Del-AWARE Unlimited, Inc. (NWRA Exhibit 23).

109. On August 13, 1982, the Secretary of the Pennsylvania Department of

Environmental Resources ("DER") advised the ACHP that DER, in the process of preparing its Environmental Assessment in conjunction with the issuance of a Dams and Encroachment Permit to NWRA for the Point Pleasant Pumping Station, considered every alternative raised by Del-AWARE Unlimited, Inc. and other opponents of the project and that "none of the alternatives, was found to be more cost-effective or involved substantially less environmental impacts" than the proposed project. (NWRA Exhibit 13, pp 67-80; NWRA Exhibit 22).

110. The Corps was provided with the results of the Department of Environmental Resources 1982 evaluation of alternatives. (NWRA Exhibit 22; NWRA Exhibit 13).

111. The Corps' Preliminary Case Report concludes that the specific site selected for the Point Pleasant Pumping

Station is virtually the only feasible one. (NWRA Exhibit 19, p. 12).

112. On September 9, 1982, the Corps advised the ACHP of the Corps confidence that there is no alternative but to cross the Canal for which planning steps had been taken to minimize any potential harm. (NWRA Exhibit 24).

113. The Department of Environmental Resources, the owner of the Canal, after its review and analysis of the construction procedures to be utilized in conjunction with the Canal crossing, granted approval of said procedures and concluded "that construction of the Point Pleasant project, followed by restoration in accordance with the specifications approved by this agency, will leave the Delaware Canal in the vicinity of Point Pleasant in better shape than it is today." (NWRA Exhibit 13, pp. 43-46; NWRA Exhibit 22).

114. The Memorandum of Agreement requires NWRA to undertake an extensive archeological testing program prior to commencement of construction. (Corps of Engineers, Exhibit 5).

115. The Memorandum of Agreement requires NWRA to utilize specific construction and restoration procedures incident to the pipeline crossing under the Delaware Canal. (Corps of Engineers, Exhibit 5).

116. The Memorandum of Agreement requires NWRA to design the above ground facilities in consultation with the SHPO, landscape the area in a manner to minimize the visual impacts of the pumping station and boundary fence in the surrounding area. (Corps of Engineers Exhibit 5).

**IV. THE U.S. ARMY CORPS OF ENGINEERS
CONSULTED WITH THE FISH AND WILDLIFE
SERVICE IN ACCORDANCE WITH THE
SUBSTANTIVE PROVISIONS OF THE FISH
AND WILDLIFE COORDINATION ACT.**

117. In December, 1980, the U.S.

Fish and Wildlife Service submitted substantive comments to the Delaware River Basin Commission for review in conjunction with the Delaware River Basin Commission's processing of NWRA's application for Section 3.8 approval. (Letter dated December 16, 1980 from Norman R. Chupp, Area Manager, U.S. Department of Interior, Fish and Wildlife Service to the Delaware River Basin Commission, Corps of Engineers Exhibit 1).

118. From December 1980, to February 1981, the technical staff of the Delaware River Basin Commission reviewed and assessed the substantive concerns expressed by the Fish and Wildlife Service in their correspondence of December, 1980. (Staff Response to Chupp, December 16, 1980, statement in regard to the Neshaminy Water Resources Authority Project, Corps of Engineers Exhibit 1).

119. In February 1981, the Executive

Director of the Delaware River Basin Commission notified the Honorable Sherman Tribbet, the Federal Representative on the DRBC, of the Delaware River Basin Commission's staff evaluation of the concerns expressed by the Fish and Wildlife Service. Contained therein was a detailed response to each and every issue raised by the Fish and Wildlife Service. (Letter dated February 4, 1981, from Gerald M. Hansler, Executive Director of the Delaware River Basin Commission to the Honorable Sherman W. Tribbet, Department of the Interior, with attachments, Corp of Engineers Exhibit 1).

120. The February 18, 1981 Docket Decision of the Delaware River Basin Commission clearly evidences DRBC's sensitivity to the issues that had been raised by the Fish and Wildlife Services. (NWRA Exhibit 3).

121. Condition "L" of the DRBC Docket Decision requires NWRA to cooperate with the Fish and Wildlife Service in the choice of an intake structure design. (NWRA Docket Decision No. D-65-76CP(8), February 18, 1981, NWRA Exhibit 3).

122. Condition "N" of the DRBC Docket Decision requires NWRA to construct the intake structure in the river during the period between November through March "to reduce the potential for impact on migrating juveniles and adult shad." (NWRA Docket Decision D-65-76CP(8) February 18, 1981, NWRA Exhibit 3).

123. Condition "U" of the DRBC Docket Decision requires construction of the Delaware River intake and intake conduit to be controlled to minimize any and all impacts on existing wetland areas. (NWRA Docket Decision #D-65-

76CP(8), February 18, 1981, NWRA Exhibit 3).

124. The Delaware River Basin Commission consultation, review and conclusions with respect to the substantive concerns raised by the Fish and Wildlife Service were judicially approved by the United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals. (Del-AWARE Water Emergency Group, et al. v. Gerald M. Hansler, et al., 536 F.Supp. 26 (E.D. Pa. 1981) aff'd., 681 F.2d 805 (3d Cir. 1982).

125. In June 1981, the U.S. Fish and Wildlife Service submitted to the U.S. Army Corps of Engineers substantive comments for consideration in the Corp processing of NWRA's permit application to build a water intake structure in the Delaware River at Point Pleasant. (Letter dated June 19, 1981, from the

U.S. Department of the Interior, Fish and Wildlife Service, to Colonel Ton, U.S. Army Corp of Engineers, Plaintiffs' Exhibit 65).

126. In July 1981, the Army Corps of Engineers requested the applicant, NWRA, to respond to the substantive comments raised by the U.S. Department of Interior, Fish and Wildlife Service. (Letter dated July 2, 1981, from Roy Denmark, Jr., Chief of the Corps, Permits Branch, to E. H. Bourquard, Engineer for Neshaminy Water Resources Authority, Corps of Engineers Exhibit 1).

127. By letter dated January 22, 1982, the applicant, NWRA, provided detailed substantive responses to the concerns expressed by the Fish and Wildlife Service in June 1981. The issues raised related to secondary impacts which have been fully evaluated by the DRBC when DRBC authorized NWRA to

withdraw up to a maximum of 95 mgd from the Delaware River from Point Pleasant. Furthermore, the Fish and Wildlife Service's concerns regarding dissolved oxygen, diadromous fish, salinity intrusion in the Delaware Bay, effects of more "skimming reservoirs", and the effects of the diversion on the North Branch of the Neshaminy Creek and East Branch of the Perkiomen Creek were merely reiterations of the same concerns that had been raised by the Fish and Wildlife Service with the DRBC, all of which had been considered and addressed by the DRBC in Docket Decision No. D-65-76CP(8). (Letter dated January 22, 1982, to Lt. Col. Roger L. Baldwin, Army Corps of Engineers from Hershel J. Richman, attorney for Neshaminy Water Resources Authority, Corps of Engineers Exhibit 1).

128. In February 1982, the substantive comments and responses from Hershel

J. Richman, attorney for Neshaminy Water Resources Authority, and E. H. Bourquard Associates, engineer for Neshaminy Water Resources Authority, were forwarded to the Fish and Wildlife Service by the Corps of Engineers for further evaluation and consultation. (Letter dated February 18, 1982 to Norman R. Chupp, U.S. Department of the Interior, Fish and Wildlife Service, from Roy E. Denmark, Jr., Chief, Permits Branch of the Corps of Engineers, Corps of Engineers Exhibit 1).

129. In March 1982, the Pennsylvania Fish Commission notified the United States Army Corps of Engineers indicating their opposition to the Point Pleasant Water Diversion Project. The Pennsylvania Fish Commission did not, however, state their reasons for such opposition nor did they indicate to the Corp what areas, if any, should be further evaluated in the permit application process.

(Letter dated March 24, 1982, from Jack G. Miller, Chief, Fisheries Environmental Services, Pennsylvania Fish Commission, to Col. Roger L. Baldwin, District Engineer, Corp of Engineers, Corps of Engineers Exhibit 1).

130. In June, 1982, the Corps of Engineers responded to all of the substantive comments previously raised by Fish and Wildlife Service during the consultation process; specifically, "cumulative effects", "dissolved oxygen", and "salinity intrusion." (Letter dated June 1, 1982, from Col. Roger L. Baldwin, Corp of Engineers, to Norman R. Chupp, Area Manager, U.S. Department of Interior, Fish and Wildlife Service, Corps of Engineers Exhibit 1).

131. In July, 1982, a new Memorandum of Agreement was entered into between the Department of Interior and the Department of the Army. Said Agreement adopted

general policies and consultation procedures to be implemented by the two agencies in the Corp's processing of permit applications under §10 of the Rivers and Harbors Act, and §404 of the Clean Water Act. Additionally, the Memorandum of Agreement contained extensive procedures for review by a higher authority ("Elevation") in the event the Corps desired to issue a permit over outstanding objections by the Fish and Wildlife Service. (Memorandum of Agreement between the Department of Interior and the Department of the Army dated July 6, 1982, Corps Exhibit 4).

132. From July, 1982 to October, 1982, the Department of Interior, Fish and Wildlife Service and the U.S. Army Corps of Engineers continued consultation as required by the Fish and Wildlife Coordination Act; evidenced by approximately 15 pieces of correspondences

between the two agencies. (Corps of Engineers Exhibit 1).

133. In September, 1982, in conformity with the Memorandum of Agreement entered into between the Department of the Army and the Department of the Interior, the Corps notified the Fish and Wildlife Service of their intent to issue a permit to NWRA. (Letter dated September 24, 1982 from Col. Roger L. Baldwin, Corp of Engineers, to Howard N. Larson, Regional Director, U.S. Fish and Wildlife Service, Corps of Engineers Exhibit 1).

134. In October, 1982, the Fish and Wildlife Service responded to the Corps notice of intent to issue a permit to NWRA. Although expressing general opposition to the Point Pleasant project, the Fish and Wildlife Service notified the Corps that "Elevation" would not be sought. (Letter dated October 18, 1982, from Howard N. Larson, Regional Director

of Fish and Wildlife Service to Col. Roger L. Baldwin, U.S. Army Corp of Engineers, Corps of Engineers Exhibit 1).

V. THE BIOLOGICAL OPINION OF THE NATIONAL MARINE FISHERIES SERVICE, DETERMINING NO SIGNIFICANT ADVERSE IMPACT ON THE ENDANGERED SHORNOSED STURGEON, EVIDENCES FULL COMPLIANCE WITH THE ENDANGERED SPECIES ACT BY THE U.S. ARMY CORPS OF ENGINEERS.

135. Pursuant to the request of NMFS and the Corps, a biological assessment of the impacts of the Point Pleasant Pumping Station and associated intake structure on the endangered species of shortnosed sturgeon, Acipenser Brevirostrum, was undertaken in 1981 by Harold M. Brundage of Ichthyological Associates, Inc. (NWRA Exhibit 36, p. 1).

136. Based on incidental capture records covering periods 1817 through 1981, the January 1982 biological assessment report states: "There is essentially no empirical information regarding

utilization of the Delaware River near Point Pleasant by shortnosed sturgeon." (NWRA Exhibit 36, pp. 70 and 51-67).

137. During Ichthyological Associates, Inc.'s intensive gill net sampling program, conducted from October through December 1981, no shortnose sturgeon were collected at the three sampling zones (1) upstream at Prahls Island, (2) Point Pleasant site or (3) downstream at Lumberville Wing Dam. (NWRA Exhibit 36, pp. 57-59).

138. All life cycles of the short-nose sturgeon including egg, larvae, juvenile, and adult stages, were portrayed in extensive detail in the January 1982 biological assessment and it concluded that "the Delaware River does not represent habitat unique or essential to shortnose sturgeon" and that "no critical habitat for the shortnose sturgeon has

been designated." (NWRA Exhibit 36, pp. 72 and 35-50).

139. Construction of the intake structure will occur only from November through March; it is uncommon for short-nosed sturgeon to be in the upriver areas after August and is absent during mid-December through May. (NWRA Exhibit 36, p. 72).

140. No shortnose sturgeon should be present near the site during the construction period; however, assuming this species did occur at the site, a special submarine blasting procedure (designed to reduce concussion and minimize blasting vibrations) has been developed to minimize potential impact to aquatic life. Such procedure is based on considerable literature regarding physical properties of an underwater blast as related to the effect on fish. (NWRA Exhibit 36, p. 74).

141. Although there was no indication that the Point Pleasant area of the Delaware River is utilized by shortnose sturgeon, the January 1982 biological assessment assuming the "worst case" situation evaluated all potential impacts that the construction and operation of the Point Pleasant Pumping Station and intake structure could have on all life cycle stages of this species. (NWRA Exhibit 36, pp. 1 and 70-94).

142. The conclusions stated in the January 1982 biological assessment prepared by Ichthyological Associates, Inc. were: (1) no critical habitat for the shortnose sturgeon had been designated at Point Pleasant; (2) no shortnose sturgeon have been taken from such location either historically or during intensive net sampling program; (3) based on known seasonal movements and results of sampling, it is unlikely that

shortnose sturgeon will occur in the vicinity of Point Pleasant during the construction period November through March; (4) in the unlikely event that shortnose sturgeon did occur in the construction area, they would not be adversely affected by the construction because the increased turbidity is well within the species' tolerance range; (5) the Point Pleasant intake structure represents the state-of-the-art technology for mitigating entrainment/impingement of aquatic organisms and shortnose sturgeon during egg, larvae, juvenile, and adult life cycles; and (6) the project will have a biologically insignificant effect on downstream dissolved oxygen concentrations. (NWRA Exhibit 36, pp. 1-3).

143. Pursuant to Section 7(b) of the Endangered Species Act, NMFS reviewed the January 1982 biological assessment and

all other available data concerning the potential impacts on the shortnose sturgeon and NMFS sent the Corps a Biological Opinion on July 19, 1982. (Corps of Engineers Exhibit 12).

144. NMFS' Biological Opinion dated July 19, 1982, concluded that "construction and operation of the Point Pleasant Pumping Station is not likely to jeopardize the continued existence of the endangered shortnose sturgeon in the Delaware River." (Corps of Engineers Exhibit 12, Biological Opinion, p. 16).

145. In its July 19, 1982 transmittal letter, NMFS advised the Corps that the Point Pleasant "project construction during the period November-March should cause no significant adverse effects on shortnose sturgeon present in the area.. .[and] the proposed state-of-the-art design of the water intake structure and projected schedule of withdrawals are

adequate to ensure that juvenile and adult shortnose sturgeon as well as sturgeon eggs and larvae present in the project area will not be significantly affected." (Corps of Engineers Exhibit 12, p. 1).

146. NMFS advised Robert Sugarman (counsel to plaintiffs, Del-AWARE Unlimited, Inc.) by letter dated September 30, 1982, that the possibility of reduced by-pass velocities did not change the NMFS Biological Opinion which stated that "the operation of the Point Pleasant Pumping Station would not be likely to jeopardize the continued existence of shortnose sturgeon in the Delaware River." (NWRA Exhibit 12, p. 1).

147. NMFS' "gave due consideration to the hydraulics of the proposed intake structure in the [biological] opinion, however, maintenance of river flow above 3,000 cfs throughout the year, was not a

basis for our conclusion...Sturgeon movements patters from other river systems show that these life stages [larvae and juvenile] are not likely to stay in the upper reaches of the river for very long....Delaware River water flows peak in March and April, therefore, adequate water velocity should be maintained past the intake structures in the early Spring when shortnose sturgeon are likely to be in the vicinity." (NWRA Exhibit 12, p. 1).

VI. All of the Administrative Agencies Carried Out Their Review and Decision Making Responsibilities in Good Faith.

148. At the outset of their involvement in this matter, the Corps advised NWRA that it wanted to examine the entirety of NWRA's planned activities in connection with the Point Pleasant Water Diversion Project to ascertain what was involved, the extent of the Corps'

jurisdiction and the permits which would eventually be required by NWRA and PECO to complete the project. To this end, the Corps required submission of extensive detailed data from NWRA. (Plaintiffs' Exhibit 15).

149. By letter dated September 8, 1980 NWRA and PECO provided the information requested. (Corps of Engineers Exhibit 9).

150. Thereafter, the Corps processed NWRA's application for permits for the Point Pleasant intake and pumping station and for the Pine Run rechannelization together, including holding public hearings on the two permit applications together. The processing of the application on the Point Pleasant intake and pumping station was completed before completion of the application on Pine Run and it was issued. (Corps of Engineers Exhibit 5).

151. Given the limitations of construction applicable to the intake, the length of time projected for completion of the intake and pumping station, the projected date by which PECO may need water from the Delaware, and the fact that the approval of the Pine Run rechannelization is not essential for the completion and use of the Point Pleasant diversion, it was reasonable for the Corps to issue the permit for Point Pleasant before completion of review of Pine Run.

152. The Corps' attempt to persuade the Fish and Wildlife Service not to "elevate" its objections to the project was not, nor is it evidence of, an abuse of discretion.

153. The Corps' determination, on or about June 8, 1981, that the Bucks County Conservancy was not a viable prospective contractor to perform historical and

archeological reviews of the area including the Village of Point Pleasant, was proper in light of the letter of March 29, 1981 from the Conservancy to the Corps apologizing for previously sending the Corps certain incomplete and incorrect information and explaining that they did not have the resources or staff to perform detailed reviews, even on a contract basis. (NWRA Exhibit 17).

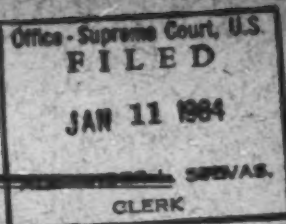
154. NWRA's suggestion that the action be taken under National Historical Preservation Act prior to the determination of whether the Village of Point Pleasant was eligible for inclusion on the National Register of Historical Places was not improper, because they offered to be bound by the requirements of the Act upon the assumption that Point Pleasant was eligible. Moreover, the Corps refused to permit such action until the determination was formally made,

which only caused further delay in the processing of the permit.

155. Colonel Baldwin's refusal to meet, or to send a representative to meet, with representatives of Del-AWARE on-site in December 1981 or to attend a conference sponsored by Del-AWARE and apparently focused on opposing the project, was not an abuse of discretion, nor was it unreasonable.

156. There is no evidence of record from which it could reasonably be inferred that the Corps, or any other reviewing agency, acted other than in the good faith desire to carry out their responsibilities under the law.

No. 83-740



In the Supreme Court of the United States

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED, INC., ET AL., PETITIONERS

v.

ROGER M. BALDWIN, ETC., ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

DAVID C. SHILTON

JANET L. STECKEL

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court improperly excluded evidence proffered by petitioners at the preliminary injunction hearing.

2. Whether the Corps of Engineers complied with Section 110(f) of the National Historic Preservation Act, 16 U.S.C. 470h-2(f), before issuing a permit for construction on the Delaware River.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Argument	11
Conclusion	18

TABLE OF AUTHORITIES

Cases:

<i>American Construction Co. v. Jacksonville, T. & K.W. R.R.</i> , 148 U.S. 372	11
<i>Camp v. Pitts</i> , 411 U.S. 138	12
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402	12
<i>Delaware Water Emergency Group v. Hansler</i> , 536 F. Supp. 26, aff'd, 681 F.2d 805	3, 5, 6, 8, 9
<i>Environmental Coalition of Nuclear Power v. NRC</i> , No. 75-1421 (3d Cir. Nov. 12, 1975)	5
<i>Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.</i> , 240 U.S. 251	11
<i>Louisiana Environmental Society, Inc. v. Coleman</i> , 537 F.2d 79	15
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519	12

Statutes:

Administrative Procedure Act, 5 U.S.C. 701 <i>et seq.</i> ..	9
Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 <i>et seq.</i>	3
§ 15.1(s) (1), 75 Stat. 713	16
Department of Transportation Act § 4(f), 49 U.S.C. 1653 (f)	15
Endangered Species Act of 1973, 16 U.S.C. 1531 <i>et seq.</i>	9

IV

Statutes—Continued:

	Page
Federal Water Pollution Control Act § 404, 33 U.S.C. (Supp. V) 1344	2
Fish and Wildlife Coordination Act, 16 U.S.C. 661 et seq.	8
National Environmental Policy Act, 42 U.S.C. 4321 et seq.	5
National Historic Preservation Act, 16 U.S.C. 470 et seq.	8
§ 110(f), 16 U.S.C. 470h-2(f)	2, 10, 14, 15, 16
Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. 403	2
88 Stat. 1233	4

Miscellaneous:

Fowler, <i>Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593 and Other Recent Developments in Federal Law</i> , 12 Wake Forest L. Rev. 31 (1976) ..	15
H.R. Rep. 96-1457, 96th Cong., 2d Sess. (1980)	15
NRC, NUREG 0974, <i>Draft Environmental Statement Related to Operations of Limerick Generating Station, Units I and II</i> (June 1983)	6

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**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2)¹ is not reported. The bench opinion of the district court (Pet. App. A7-A64)² is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2) was entered on July 5, 1983. A petition for rehearing was denied on August 2, 1983 (Pet. App.

¹ Petitioners have filed two differently paginated copies of the Appendix. The page numbers herein refer to the xeroxed, 169 page version.

² The district court adopted (Pet. App. A35-A36) almost all of the Proposed Findings of Fact of the Neshaminy Water Resources Authority reprinted at Pet. App. A71-A113.

A3-A4), and the petition for a writ of certiorari was filed on October 31, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The National Historic Preservation Act §110(f), 16 U.S.C. 470h-2(f) (NHPA), provides:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

STATEMENT

Petitioners instituted this action in the United States District Court for the Eastern District of Pennsylvania on November 2, 1982, seeking review of the issuance by the United States Corps of Engineers (Corps) of a permit to the Neshaminy Water Resources Authority (Neshaminy) for the construction of a water intake structure and pumping station on the Delaware River at Point Pleasant, Pennsylvania. The permit was issued pursuant to the Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. 403, and the Federal Water Pollution Control Act § 404, 33 U.S.C. (Supp. V) 1344 (Clean Water Act). Petitioner also requested a preliminary injunction to prevent the planned commencement of construction in January 1983.

1. The Corps permit covers but one small part of a comprehensive plan for the construction of facilities for the withdrawal, diversion and use of water from the Delaware River that has been developed

by the Delaware River Basin Commission (Commission) over the last 20 years in order to meet the water resources needs of the Delaware River Basin area.³ The basic plan approved by the Commission is for water to be diverted from the Delaware River by means of a pumping facility and intake structure at Point Pleasant, Pennsylvania. This water is to be used to supplement water supplies in Bucks and Montgomery Counties, Pennsylvania, and to provide water, when that becomes necessary, to the Limerick Generating Station in Montgomery County.

The Commission's overall plan has been subjected to extensive administrative and judicial review over the last 20 years. The present project is the result of a 1966 study of the Neshaminy Creek Basin by the Pennsylvania Department of Environmental Resources, the United States Soil Conservation Service, Bucks County and Montgomery County. The plan for this project was approved by the Commission and included in the Delaware River Basin Comprehensive Plan on October 26, 1966. In 1971, the Commission plan was amended to include an enlarged Point Pleasant Pumping Station supplying approximately 150 million gallons per day (mgd) for Limerick

³ The Commission was created by the Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 *et seq.*, of which the United States and the States of New York, New Jersey, Pennsylvania and Delaware are signatories. Pursuant to that compact, the Commission is granted "broad responsibility and control over planning and allocating the water resources of the entire Delaware River Basin, including both surface and ground waters." *Delaware Water Emergency Group v. Hansler (Delweg)*, 536 F. Supp. 26, 28 (E.D. Pa. 1981), *aff'd*, 681 F.2d 805 (3d Cir. 1982).

and Neshaminy's municipal water users. The Commission filed an environmental impact statement (EIS) in 1973, which concluded that the proposed project would be beneficial to the watersheds of both creeks involved and not detrimental to the Delaware River, provided that various express conditions concerning the control and use of water contained therein were followed. Pet. App. A73-A75.

During the late 1970's, study of the present and the contemplated future water needs of the area continued. Although the contours of the project remained basically the same, population projections compiled by the Commission in 1978 led Neshaminy to prepare a new environmental report in order to reevaluate the project as then constituted. As a result, Neshaminy submitted to the Pennsylvania Department of Environmental Resources an application to modify the previously granted permit because of a decreased need for supplemental water, reducing the Point Pleasant withdrawal from 150 mgd to approximately 95 mgd. In 1978, this permit was issued, along with an extensive report by the Pennsylvania Department of Environmental Resources analyzing and justifying the issuance of the permit. Pet. App. A75-A77.

Meanwhile, aspects of this project had also been undergoing review by the federal government. In 1973, the Atomic Energy Commission (AEC) prepared an EIS regarding the proposed Limerick Generating Station, including the Point Pleasant Pumping Plant and the transmission lines needed to transport water to Limerick. In 1974, the Nuclear Regulatory Commission (NRC), which had succeeded to the licensing functions of the AEC (88 Stat. 1233), granted a construction permit to Philadelphia

Electric for the Limerick plant. The validity of this permit was affirmed after judicial review. *Environmental Coalition of Nuclear Power v. NRC*, No. 75-1421 (3d Cir. Nov. 12, 1975). Finally, in 1976, the United States Soil Conservation Service prepared a final EIS encompassing the entire water plan for the Delaware River Basin area. Pet. App. A77-A78.

2. In 1979, Philadelphia Electric and Neshaminy filed with the Commission applications for approval of their portions of the proposed transmission system, including the Point Pleasant Pumping Station. After the preparation of an extensive environmental assessment, the Commission issued a "negative declaration," finding that the proposed project would have no significant adverse effect on the environment and that the preparation of a separate EIS was not necessary. In August 1980, the Commission published its "Final Environmental Assessment for the Neshaminy Water Supply System" and granted the applications of Philadelphia Electric and Neshaminy, subject to certain express conditions and limitations. Pet. App. A78-A80.⁴

These Commission approvals were challenged in the *Delweg* litigation. Plaintiffs there claimed that there had been a failure to comply with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA). The district court disagreed, finding that the numerous environmental assessments

⁴ In May 1981, the Commission completed an additional environmental study—the Delaware River Basin Comprehensive (Level B) Study—which also encompassed the plans for the Point Pleasant Pumping Station to withdraw 95 mgd for use at Limerick and the North Branch Water Treatment Plant. *Delweg*, 536 F. Supp. at 43-44.

of the proposed project were thorough, reliable and up-to-date. *Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26, 48-49 (E.D. Pa. 1981).⁶ This decision was approved on appeal without opinion (681 F.2d 805 (3d Cir. 1982)).

3. In December 1980, Neshaminy submitted to the Corps applications for approval of two aspects of the planned pumping facilities and associated systems—the construction of the Point Pleasant intake structure and the rechannelization of Pine Run Creek. In connection with its consideration of these applications, the Corps received numerous comments from the public and from federal and state agencies.⁶

⁶ In that decision, the district court did not, as petitioners claim (Pet. 7-8), rely on the assumption that further EISs would be compiled by the Corps and the NRC in connection with this project. The court rejected the claim of plaintiffs that the sighting of shortnose sturgeon, an endangered species, in the Delaware subsequent to the Commission's environmental assessment mandated the preparation of an EIS. The court noted that the record did not show that the project would jeopardize the habitat of such species. The court pointed out in addition that the effect of the project on the shortnose sturgeon could be assessed by the Corps in considering the permit for the intake structure. Finally, the court noted that the NRC would prepare an EIS in connection with the Limerick operating permit, which could also consider that matter. *Delweg*, 536 F. Supp. at 46. As predicted by the district court in *Delweg*, the Corps did fully consider the effect of the project on shortnose sturgeon in connection with its issuance of the permit for the intake structure (Pet. App. A124). These effects were also considered by the NRC in connection with its review of a request for an operating permit for Limerick. NRC, *NUREG 0974, Draft Environmental Statement Related to Operation of Limerick Generating Station, Units I and II*, at 4-51, 5-36 (June 1983).

⁶ Comments and opinions were received from the Environmental Protection Agency, the National Marine Fisheries Service of the National Oceanic and Atmospheric Adminis-

In addition, the Corps consulted with the Pennsylvania Historic Preservation Office and the Advisory Council on Historic Preservation.⁷

After reviewing these comments and all previous environmental reviews that were before the Commission, the Corps issued its environmental assessment of October 14, 1982 (Pet. App. A142-A160). It determined that the issuance of the permit did not constitute a major federal action and that the installation and operation of the water intake, conduit and pumphouse would not significantly affect the human environment. Therefore, on October 25, 1982, on the basis of its Statement of Findings, the Corps issued permit No. NAPON-R-80-534-3 to Neshaminy (Pet. App. A114-A141). The Commission reserved action on Neshaminy's application for a permit for the rechannelization of Pine Run Creek.

tration, the Fish and Wildlife Service of the Department of the Interior, and the Advisory Council on Historic Preservation (Pet. App. A123-A125). The Pennsylvania Department of Environmental Resources referred to the Corps a detailed environmental assessment on the project in connection with its issuance to Neshaminy, on September 2, 1982, of Dams Safety and Encroachment permits for the Point Pleasant intake structure construction. Comments were also received from the Pennsylvania Fish Commission and the Pennsylvania State Historic Preservation Office. Pet. App. A125-A126.

⁷ This consultation resulted in a Memorandum of Agreement with those agencies that sets out steps to be taken by Neshaminy and the Corps in order to limit the effect of the intake structure's construction and operation on the historic values of the area. The Pennsylvania Canal, which will be crossed by the project, is a national historic landmark, and Point Pleasant has been nominated to the National Register of Historic Places (Pet. 42).

4. Petitioners' complaint in the instant action named as defendants numerous federal, state, and Commission officials. It challenged the issuance of the construction permit by the Corps, alleging, inter alia, violations of NEPA, the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, and the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*, and sought a preliminary injunction against construction of the intake structure. After initial briefing, including various motions by the defendants to dismiss portions of the complaint, to deny the motion for preliminary injunction, and to limit the evidentiary record, the preliminary injunction hearing commenced on November 30, 1982, and continued through December 10, 1982. As an initial matter, the court ruled that review would be limited to the administrative record (Pet. App. A164):

to determine whether or not, under either a reasonableness standard or an arbitrary and capricious standard the agency somehow misapplied the law, misinterpreted the evidence, overlooked certain testimony, or unreasonably reached no significant impact determinations.

The court further held that the burden would be on petitioners to show that the Corps' environmental impact study was improperly prepared or issued. It accordingly held that testimony or evidence outside the administrative record might be introduced, in the court's discretion, to support petitioners' allegations that the administrative record was deficient (Pet. App. A165-A166). Furthermore, the court adopted as binding the decision in *Delweg*, and ruled that its consideration would be limited to those issues that had not been considered in the Commissioner's environmental assessment approved in *Delweg* (Pet. App. A166).

The court heard extensive arguments of counsel, and received as evidence numerous documents relating to issues that petitioners contended had not been adequately considered by the Corps. In addition, Richard McCoy, an employee of the Fish and Wildlife Service proffered by petitioners, testified regarding the concerns of that agency about the construction of the Point Pleasant intake structure (C.A. App. 2536-2584). Finally, after determining from petitioners' counsel that there was no further evidence that petitioners wished to present at this preliminary stage, the court reviewed and ruled upon the exhibits offered by the parties (C.A. App. 2997-3123).

On December 15, 1982, the district court issued its decision (Pet. App. A7-A64) from the bench. The court dismissed petitioners' claims under the National Historic Preservation Act, and Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), the Clean Water Act, and the Rivers and Harbors Appropriation Act of 1899, as well as against certain named individuals and state agencies (Pet. App. A5-A6, A11-A14).⁸ Assuming (Pet. App. A10) that petitioners could amend their complaint to assert a claim under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (APA), the court then denied the motion for a preliminary injunction resting on the NEPA and APA claims (Pet. App. A6, A15), finding no abuse of discretion or failure to consider adequately other agency views (Pet. App. A15-A16).⁹ Accordingly, the court

⁸ Petitioners do not here challenge these dismissals.

⁹ The court found that many of petitioners' claims had been before the court in *Delweg*, and that petitioners were estopped from relitigating those claims (Pet. App. A16-A17). It found the new issues raised by petitioner to be without

found that petitioners were not entitled to a preliminary injunction because they had shown no likelihood of success on the merits, and respondents had shown that they and the public would be severely harmed if the project did not go forward as scheduled (Pet. App. A36-A37).

5. Petitioners appealed only the denial of the preliminary injunction, presenting the same substantive issues raised in the district court. In addition, petitioners challenged the district court's evidentiary rulings, claiming the court improperly had limited its review to the Corps' administrative record, and had refused to permit them to present evidence not in the Corps' record to show that the Corps' environmental assessment was inadequate. The court of appeals affirmed the district court's decision by judgment order (Pet. App. A1-A2).

merit, concluding, inter alia, that the Corps had not violated Section 110(f) of the NHPA. Because the Corps properly relied on the Commission's determination, based on an adequate consideration of alternatives, that the location of the intake structure at Point Pleasant was the only feasible one, the court found that the Corps was not required by Section 110(f) to consider again alternatives outside that area. Accordingly, the Corps' only responsibility under Section 110(f) had been to take adequate action to minimize impact on the Pennsylvania Canal, located at Point Pleasant, which the court found it had done (Pet. App. A18-A19, A26-A27, A46-A52). The court also found that the Corps had adequately consulted with the Fish and Wildlife Service. The Fish and Wildlife Service had raised no new concerns, and its failure to refer the matter to a higher authority to resolve such disagreements (as provided in a Memorandum of Understanding between the Corps and Interior) indicated that it did not see any significant adverse impacts on fish from the project (Pet. App. A25, A27).

ARGUMENT

Petitioners have not shown any reason why this Court should depart from its usual practice of declining to review interlocutory orders of the courts below. In any event, the decision below is correct, and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners ask this Court to review the denial of a preliminary injunction. This Court will not undertake such interlocutory review "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.W. R.R.*, 148 U.S. 372, 384 (1893); accord, *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). Petitioners have made no such showing. They raise only two issues here—whether the district court at the preliminary injunction hearing improperly excluded evidence which was not part of the Corps' administrative record (Pet. 16-39), and whether the district court properly interpreted the Corps' duties under the NHPA (Pet. App. 39-56). Neither issue is foreclosed by the denial of the preliminary injunction—instead, both can be raised at the trial on the merits, and, if necessary, on appeal from a final decision on the merits. Ultimately, petitioners will be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of any final judgment against them.

2. In any case, the decision below is correct. Despite petitioners' claim to the contrary (Pet. 20-21), the

district court here did not exclude all evidence outside the administrative record. Instead, it adopted petitioners' view that extra-record evidence is admissible to identify important matters not considered by the agency.¹⁰ After noting that judicial review in cases such as this is generally limited to the administrative record, the court held (Pet. App. A165):

Testimony outside of the administrative record is not precluded in my opinion as a matter of law; the Court has discretion to permit it, where it would tend to advance specific allegations by the plaintiffs that the administrative record is deficient, so as to render the decision made by the administrative agency without evidence and without consideration of the various environmental considerations imposed under the regulations and statute upon the agency to review, analyze and consider.

Furthermore, although petitioners baldly assert otherwise (Pet. 20), the record amply demonstrates that the district court admitted almost all their ex-

¹⁰ Petitioners incorrectly suggest that the district court, in environmental cases, should permit a more extensive use of extra-record evidence in reviewing agency adjudicatory decisions not based on an adversary record (Pet. 16-20). This Court has consistently stated that such review must be based on "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-420 (1971). Even where the administrative record is found inadequate to support the agency's decision, this Court has prohibited remedial evidentiary proceedings in the reviewing court, holding instead that inadequate records must be remanded to the agency for supplementation. *Vermont Yankee Nuclear Power Corp. v. NRDC*, *supra*; *Camp v. Pitts*, *supra*.

trinsic evidence. Petitioners offered 91 documents as evidence: only 20 were excluded. Of these 20, only 7 apparently were excluded solely because they were not part of the Corps' record.¹¹ Petitioners do not assert that any of these documents was critical.¹² The district court admitted 60 of the documents offered by petitioners,¹³ 15 of them over the objection of the government that they were not part of the

¹¹ Nos. 25 (C.A. App. 3023-3026); 30 (C.A. App. 3028-3029); 35 (C.A. App. 3032-3033); 37 (C.A. App. 3034-3036); 53 (C.A. App. 3054-3064); 54 (C.A. App. 3064-3065); and 74 (C.A. App. 3086-3087).

The remaining 13 documents were excluded for other reasons. Nos. 8 and 21 were excluded because they were draft documents and addressed an issue (the Pine Run rechannellization) that was not part of the consideration of the Point Pleasant permit (C.A. App. 3006-3008, 3021-3022). Nos. 24, 63 and 86 were excluded because they were not complete documents (C.A. App. 3023, 3077-3078, 3115-3117). No. 26 was excluded because counsel had not presented it to the court during the preliminary injunction hearing and, therefore, had laid no foundation upon which the court could rule as to its admissibility (C.A. App. 3026-3027). No. 39 was excluded because it was offered on a purely legal issue for which the taking of evidence was unnecessary (C.A. App. 3038-3040). No. 40 was excluded as irrelevant (C.A. App. 3040-3041). Nos. 42 and 75 were excluded as unnecessary and cumulative (C.A. App. 3042-3043, 3088-3091). No. 62 was excluded as work product (C.A. App. 3075-3077). No. 85 was excluded as hearsay (C.A. App. 3106-3115). No. 91 was excluded as not probative (C.A. App. 3118-3121).

¹² Instead, they claim only that "[c]ritical documents which had not been included in the Corps of Engineers 'administrative record' * * *, were refused admittance except by the largesse of the court" (Pet. 20).

¹³ The remaining 11 documents were not admitted because they either were missing or were duplicates of other documents.

administrative record.¹⁴ Petitioners' "Hearing Plan" noted 19 possible witnesses, but indicated that their testimony would be duplicative of materials presented to the Corps (C.A. App. 191). Petitioners proffered only two of these witnesses at the preliminary injunction hearing. One of those witnesses, Ricard McCoy, was heard by the court (page 9, *supra*). The other was not heard because his testimony would have been duplicative of evidence already in the record (C.A. App. 2393). Thus, the district court allowed petitioners broad leeway in presenting evidence to support their contention that the Corps failed to consider important environmental matters.

3. Petitioners' other claim—that the Corps failed to fulfill its responsibilities under Section 110(f) of the NHPA (Pet. 39-56)—is equally without merit. They contend that the Corps refused to consider any alternative to crossing the Pennsylvania Canal at Point Pleasant, but instead improperly deferred to the consideration of alternatives previously completed by the Commission, which chose the Point Pleasant crossing site before the passage of Section 110(f) and, therefore, could not have applied the required historical preservation considerations (Pet. App. 45-46, 49-56). Petitioners also argue (Pet. 46-49) that, even if the Point Pleasant crossing was the only prudent and feasible alternative, the Corps failed to minimize harm to the canal there.

a. The Corps' consideration of alternatives fully complied with its responsibilities under Section 110(f) of the NHPA. That section by its terms requires only that agencies that take action adversely affecting a National Historic Landmark "to the maximum ex-

¹⁴ Nos. 3, 6, 7, 10, 14, 31, 33, 34, 36, 38, 43, 59, 61, 72, and 80.

tent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark" and allow the Advisory Council an opportunity to comment on the undertaking.¹⁵ The legislative history confirms the plain statutory language. It makes clear that prudent and feasible alternatives should be considered by the agency, but that Congress did not require a finding of no such alternative as a mandatory initial step without which the agency may not proceed. The House report on this Section states H.R. Rep. 96-1457, 96th Cong., 2d Sess. 38 (1980):

Although the Committee deleted a mandatory requirement that an agency first determine that "no prudent and feasible alternative for such undertaking exists," the Committee does intend for agencies to consider prudent and feasible alternatives.

Thus, NHPA, like NEPA, is a procedural statute. It is designed to protect our nation's cultural heritage by assuring that a good faith *consideration* of preservation values is made before agencies take action that could adversely affect a landmark. See Fowler, *Federal Historic Preservation Law: National Historic*

¹⁵ Contrary to petitioners' suggestion (Pet. 44, 47-49), Section 110(f) is distinctly different from Section 4(f) of the Department of Transportation Act, 49 U.S.C. 1653(f). The latter Section flatly prohibits the agency from approving a project that crosses public parkland unless it initially makes a two-part finding: first, that there is no prudent or feasible alternative; and second, that the program includes all possible planning to minimize harm to the parkland. In any event, the Corps' action here would satisfy even the stringent requirements of 49 U.S.C. 1653(f), under which an alternative may be rejected if it is "reasonably determined" to be imprudent. *Louisiana Environmental Society, Inc. v. Coleman*, 537 F.2d 79, 85 (5th Cir. 1976).

Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law, 12 Wake Forest L. Rev. 31 (1976).

Nothing in Section 110(f) prohibits the Corps from deferring to the decision of the Commission, the agency with overall responsibility for the project, that there was no prudent and feasible alternate crossing site outside of the Point Pleasant area (Pet. App. A132). The Commission, after extensive study of environmental and other factors (see pages 3-6, *supra*), concluded that there was no other reasonably possible place to cross the canal than Point Pleasant. The Corps properly relied on this judgment in issuing the permit necessary for completion of a part of the project.¹⁶ The Corps fulfilled its statutory obligation to consider alternatives by studying alternatives within the Point Pleasant area, since alternatives outside that area were not prudent or feasible.

Within the Point Pleasant area, the Corps gave full consideration to alternative ways to protect the historic values of the site. It considered five possibilities—abandoning the project, relocating the project in the southwest, southern or northern portions of the area, and installing an intake conduit over the canal (Pet. App. A132-A133, A154-A155). Each of these alternatives was rejected for various reasons as not

¹⁶ Deference to the Commission in the overall planning of the project is required by the Delaware River Basin Compact, Pub. L. No. 87-328, § 15.1(s)(1), 75 Stat. 713. However, the Corps' deference to the Commission's determination regarding feasible locations for the crossing did not improperly cede its statutory responsibilities under the NHPA to the Commission, as petitioners suggest (Pet. 49-56). Instead, having accepted the Commission's judgment about the impracticality of relocating the crossing, the Corps carefully addressed historic preservation concerns within the area.

feasible, and the location proposed by Neshaminy was found to be "virtually the only feasible one,"¹⁷ and "the most practicable."¹⁸

b. Furthermore, contrary to petitioners' claim (Pet. 46-49), having found the Point Pleasant crossing to be the most feasible, the Corps made extensive efforts to minimize harm to the canal from the project. Most significantly, the Corps incorporated into its permit to Neshaminy a Memorandum of Agreement that it entered into with the Pennsylvania State Historic Preservation Officer (representing the owner of the canal) and the Advisory Council on Historic Preservation (the federal entity charged with responsibility for ensuring compliance with the NHPA). The Memorandum outlines extensive efforts that must be made by Neshaminy during the construction of the project to minimize harm to the canal (C.A. App. 2042-2050).¹⁹

Despite petitioners' attempt to paint this case as one in which the Corps, through inaction, evaded its duties under the NHPA, it is clear that the Corps amply fulfilled its duty to consider historical values in issuing a permit to Neshaminy.

¹⁷ Pet. App. A132-A133.

¹⁸ Pet. App. A155.

¹⁹ The Corps thus fulfilled precisely those duties "deferred" to it by the Commission in its 1980 Environmental Assessment, to which petitioners refer (Pet. 50). In that assessment, the Commission simply noted that the Corps should be the lead agency in consultations with the Advisory Council. (See Pet. App. A95-A96.)

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

DAVID C. SHILTON

JANET L. STECKEL

Attorneys

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Office - Supreme Court, U.S.

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CLERK

No. 83-740

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

DEL-AWARE UNLIMITED, INC., et al.,
Petitioners

v.

ROGER M. BALDWIN, District Engineer
United States Corps of Engineers, et al.,
*Respondents**

**BRIEF OF NESHAMINY WATER
RESOURCES AUTHORITY IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

Of Counsel:

COHEN, SHAPIRO, POLISHER,
SHIEKMAN AND COHEN

23rd Floor PSFS Building
12 South 12th Street
Philadelphia, PA 19107

215-922-1300

December 2, 1983

Alan M. Lerner, Esq.
Hershel J. Richman, Esq.
David J. Brooman, Esq.

*Counsel for Respondent
Neshaminy Water
Resources Authority*

*A full list of the parties is set forth on page ii of this Brief.

TABLE OF CONTENTS

	Page
List of Parties	ii
Table of Authorities	iii
I. Counter-Statement of The Issues	1
II. Counter-Statement of The Case	2
III. Argument	4
A. PETITIONERS HAVE IMPROVIDENTLY REQUESTED THIS COURT TO REACH THE ULTIMATE MERITS OF THEIR CASE AND, THEREFORE, THIS COURT SHOULD DENY CERTIORARI JURISDICTION	4
B. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY DEFINED THE SCOPE OF THE DISTRICT COURT CONSIDERATION OF EVIDENCE DEHORS THE ADMINISTRATIVE RECORD	9
1. The Asserted Conflict Among The Circuits Does Not Warrant Review	10
2. The Evidence Which Petitioners Claim Was Improperly Excluded Was Repetitive And Cumulative And Was Never Properly Proffered	15
C. THE DISTRICT COURT CORRECTLY RULED IN DENYING PETITIONERS MOTION FOR A PRELIMINARY INJUNCTION THAT PETITIONERS DID NOT DEMONSTRATE A REASONABLE LIKELIHOOD OF PREVAILING ON THEIR CLAIM UNDER THE NATIONAL HISTORIC PRESERVATION ACT; THE DISTRICT COURT DID NOT REACH THE ULTIMATE MERITS	16
IV. CONCLUSION	22
CERTIFICATE OF COUNSEL	23
CERTIFICATE OF SERVICE	24
APPENDIX "A" TO BRIEF	A-1
APPENDIX "B" TO BRIEF	B-1

LIST OF PARTIES

DEL-AWARE UNLIMITED, INC., VAL SIGSTEDT, COLLEEN WELLS, MARC SADOUX, MARION W. MASLAND, TOWNSHIP OF BRISTOL, NORMAN AND DIANE TORKELSON, THE PHILADELPHIA FEDERATION OF SPORTSMEN'S CLUBS, SAMUEL LANDIS, CHARLES GILMORE, MARY ELLEN NOBLE, THE PENNSYLVANIA STATE FEDERATION OF SPORTSMEN'S CLUBS, HONORABLE RITA C. BANNING, WATERSHED ASSOCIATION OF THE DELAWARE RIVER, HONORABLE JAMES C. GREENWOOD, HONORABLE CARL FONASH,

Petitioners

v.

ROGER M. BALDWIN, individually, and as District Engineer, U.S. Army Corps of Engineers, ALEXANDER ALDRICH, individually and as Chairman of the Advisory Council on Historic Preservation, WILLIAM GORDON, individually and as Assistant Secretary U.S. Department of Commerce; GERALD HANSLER, individually, and as Executive Director, the Delaware River Basin Commission, HAROLD DENTON, individually and as Director, Division of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, THE NUCLEAR REGULATORY COMMISSION; THE HONORABLE PETER DUNCAN, as Secretary of the Department of Environmental Resources of the Commonwealth of Pennsylvania; NESHAMINY WATER RESOURCES AUTHORITY; and PHILADELPHIA ELECTRIC COMPANY,

Respondents

TABLE OF AUTHORITIES

Cases	Page
<i>A.L.K. Corp. v. Columbia Pictures Industries, Inc.</i> , 440 F.2d 761 (3d Cir. 1971)	5
<i>Alabama v. United States</i> , 279 U.S. 228 (1929) . .	4
<i>Asarco, Inc. v. Environmental Protection Agency</i> , 616 F.2d 1153 (9th Cir. 1980)	15
<i>Avoyelles Sportsmen's League, Inc. v. Marsh</i> , ____ F.2d ____, 19 E.R.C. 1841 (5th Cir., Opinion filed September 26, 1983)	10, 11, 15
<i>Brown v. Chote</i> , 411 U.S. 452 (1973) . . .	4, 5, 7, 8, 17
<i>Camp v. Pitts</i> , 411 U.S. 138 (1973)	10
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971)	9, 10, 11, 12, 13, 17, 18, 19
<i>City of Los Angeles v. Lyons</i> , 453 U.S. 1308 (1981) .	4
<i>County of Suffolk v. Secretary of the Interior</i> , 562 F.2d 1368 (2d Cir. 1977)	12, 14, 15
<i>Delaware River Port Authority v. Transamerican Trailer Transport, Inc.</i> , 501 F.2d 917 (3d Cir. 1974)	5
<i>Delaware Water Emergency Group v. Hansler</i> , 536 F. Supp. 26 (E.D. Pa. 1981) <i>aff'd</i> , 681 F.2d 805 (3d Cir. 1982)	2, 20
<i>Doran v. Salem Inn, Inc.</i> , 422 U.S. 922 (1975) . .	4
<i>Eli Lilly and Co. v. Premo Pharmaceutical Labora- tories, Inc.</i> , 630 F.2d 120 (3d Cir. 1980), <i>cert. denied</i> , 449 U.S. 1014 (1980)	5
<i>Environmental Coalition of Nuclear Power v. NRC</i> , ____ F.2d ____ (No. 75-1421, 3d Cir. 1975) .	2
<i>Ethyl Corp. v. EPA</i> , 541 F.2d 1 (D.C. Cir. 1976) <i>cert. denied</i> , 426 U.S. 941 (1976)	11

TABLE OF AUTHORITIES—(Continued)

Cases	Page
<i>Fayetteville Area Chamber of Commerce v. Volpe</i> , 515 F.2d 1021 (4th Cir. 1975) cert. denied, 423 U.S. 912 (1975)	15
<i>Grazing Fields Farm v. Goldschmidt</i> , 626 F.2d 1068 (1st Cir. 1980)	15
<i>Image of Greater San Antonio, Texas v. Brown</i> , 570 F.2d 517 (5th Cir. 1978)	12
<i>Izaak Walton League of America v. Marsh</i> , 665 F.2d 346 (D.C. Cir. 1981)	11, 12, 13, 15
<i>Kennecott Corp. v. Smith</i> , 637 F.2d 181 (3d Cir. 1975)	5
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976)	10, 11, 13
<i>Oburn v. Shapp</i> , 521 F.2d 142 (3d Cir. 1975)	5
<i>Strycker's Bay Neighborhood Council v. Karlen</i> , 434 U.S. 223 (1980)	10, 11
<i>U.S. Steel Corporation v. Fraternal Association of Steelhaulers</i> , 431 F.2d 1046 (3d Cir. 1970)	5
<i>United States v. Bianchi</i> , 373 U.S. 709 (1963)	10
<i>University of Texas v. Camenisch</i> , 451 U.S. 390 (1981)	4, 5, 9, 17
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1978)	10, 11, 12, 14
Statutes	
Administrative Procedures Act, 5 U.S.C. §706(2)	10
Department of Transportation Act of 1966, 49 U.S.C. §1653(F)	18, 19
Federal-Aid Highway Act of 1968, 23 U.S.C. §138	18

TABLE OF AUTHORITIES—(Continued)

<i>Statutes</i>	<i>Page</i>
National Environmental Policy Act of 1966, 42 U.S.C. §§433 et seq.	9
National Historic Preservation Act, 16 U.S.C. §470 H-2(a)(1)	16, 17, 18, 19, 20, 21
<i>Rules</i>	
<i>Federal Rules of Civil Procedure</i>	
Rule 61	15
<i>Federal Rules of Evidence</i>	
Rule 103(a)	15
<i>Other Authorities</i>	
H.R. Rep. No. 96-1457 at 38, 96th Cong., 2nd Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 6378, 6401	19

I. COUNTER-STATEMENT OF THE ISSUES

1. Did the District Court and the Court of Appeals correctly define the scope of the District Court's consideration of evidence dehors the Administrative Record?

2. Does the Third Circuit's conclusion that the District Court did not commit an abuse of discretion in denying petitioners' motion for a preliminary injunction holding, in pertinent part, that petitioners were not likely to prevail on their claim under, *inter alia*, the National Historic Preservation Act, create a case of such national importance to justify this Court's certiorari jurisdiction before a full trial on the merits?

II. COUNTER-STATEMENT OF THE CASE

With this Petition from the affirmance by the United States Court of Appeals for the Third Circuit from the denial of the petitioners' application for a preliminary injunction, this Court is presented with yet another in a seemingly endless parade of requests to halt the development of the Point Pleasant Water Diversion Project ("Project"), and thus prevent the drawing of water from the Delaware River for essential public water supply in Bucks and Montgomery Counties, Pennsylvania, and for use as cooling water for Philadelphia Electric Company's ("PECO") Limerick Plant, Montgomery County, Pennsylvania. See, *Environmental Coalition of Nuclear Power v. NRC*, ____ F.2d ____ (No. 75-1421, 3d Cir. 1975); *Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26 (E.D. Pa. 1981) *aff'd*, 681 F.2d 805 (3d Cir. 1982). In the courts below, petitioners attacked, *inter alia*, the issuance of a permit to the Neshaminy Water Resources Authority ("NWRA") by the United States Corps of Engineers ("Corps of Engineers") to permit the NWRA to construct and operate the Point Pleasant Project. Petitioners claimed that the issuance of the permit violated the National Environmental Policy Act of 1969 and a host of other acts and regulations.

Since 1966, there have been four final Environmental Impact Statements, and several Environmental Assessments and Environmental Reports by a variety of federal and state agencies, including the Delaware River Basin Commission ("DRBC"), the United States Nuclear Regulatory Commission ("NRC"), the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the NWRA and the PECO. Supporting these overall reviews were countless specific scientific studies and reviews, negotiated changes in one or more aspects of the Project and a fifteen-year effort to minimize, if not totally eliminate, any risk of harm to the

environment from the Project. The history of these exhaustive studies, reviews and reports, and their results, is set forth in the detailed Findings of Fact of the District Court below, (A-79 to A-96; A-83 to A-127).

These findings by the District Court are not clearly erroneous and amply support the Third Circuit's affirmance that petitioners failed to demonstrate a likelihood of success on the merits or a threat of significant, immediate and irreparable harm if a preliminary injunction did not issue, but to the contrary established that the respondents NWRA and PECO, as well as the public, would suffer serious harm if the project were delayed.

For the reasons set forth more fully below, this Court should deny exercising certiorari jurisdiction.

III. ARGUMENT

A. PETITIONERS HAVE IMPROVIDENTLY REQUESTED THIS COURT TO REACH THE ULTIMATE MERITS OF THEIR CASE AND, THEREFORE, THIS COURT SHOULD DENY CERTIORARI JURISDICTION

The sole basis for appellate review of the actions of the United States District Court for the Eastern District of Pennsylvania is that the court denied petitioners' motion for a preliminary injunction. An order granting or denying a preliminary injunction will not be disturbed unless it was an abuse of discretion by the trial court. See, e.g., *City of Los Angeles v. Lyons*, 453 U.S. 1308 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Brown v. Chote*, 411 U.S. 452 (1973); *Alabama v. United States*, 279 U.S. 229 (1929). And, if this Court decides to exercise certiorari jurisdiction over this case, the sole issue which the Court may address is whether the Court of Appeals for the Third Circuit erred when it ruled that the district court did not abuse its discretion in denying petitioners' request for a preliminary injunction. This Court does not have jurisdiction, at this stage of the proceedings, to decide the issues framed by the petitioners since these issues relate to the ultimate merits; issues which were not finally decided by the District Court nor the Third Circuit Court of Appeals. Accord, *Brown v. Chote*, *supra*.

The rationale upon which this limited standard of appellate review is based was articulated by this Court in *University of Texas v. Camenisch*, 451 U.S. 390 (1981), wherein Justice Stewart stated:

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary

injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

Id. at 395; see also, *U.S. Steel Corporation v. Fraternal Association of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970).

In evaluating whether to issue the requested preliminary injunction, the District Court placed the burden on petitioners to show: (1) that they will be irreparably injured *pendente lite* if relief is not granted, and (2) that they have a reasonable probability of eventual success in the litigation. *Eli Lilly and Co. v. Premo Pharmaceutical Laboratories, Inc.*, 630 F.2d 120 (3d Cir. 1980), *cert denied*, 449 U.S. 1014 (1980); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980). Accord, *Brown v. Chote*, *supra*. The District Court further considered (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *Oburn v. Shapp*, 521 F.2d. 142, 147 (3d Cir. 1975); *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-920 (3d Cir. 1974); *A.L.K. Corp. v. Columbia Pictures Industries, Inc.*, 440 F.2d 761, 763 (3d Cir. 1971). Accord, *University of Texas v. Camenisch*, *supra*.

While petitioners' complaint alleged that the Project would cause the destruction of everything from a fishing spot adjacent to Point Pleasant to life as we know it in Bucks and Montgomery Counties, Pennsylvania, petitioners failed to identify and prove which, if any, of the alleged dangers would become fixed and would be irreparable pending litigation on the merits. Indeed, petitioners failed to proffer one witness to testify on their irreparable harm.

By contrast, both the Corps of Engineers' administrative record and the DRBC administrative record evaluated by the District Court indicated the great public interest served by the Project. The testimonies of John Muller, engineering consultant of the Neshaminy Water

Resources Authority, and Vincent Boyer, Vice-President of Philadelphia Electric Company, demonstrated the enormous financial harm which would accrue to private and public interests in the event a preliminary injunction would issue. In denying the preliminary injunction, the District Court held, in pertinent part:

In considering whether or not the plaintiffs have borne their burden of proving entitlement to injunctive relief, the Court must consider whether or not the plaintiffs will suffer irreparable harm if relief is not granted, or whether the defendants will be harmed if relief is granted, whether the public, generally, will be harmed if relief is granted and whether the plaintiffs are likely to prevail on the merits of the claim. I have found that considering the evidence before me, that the plaintiffs have not shown that they are likely to prevail on the merits of the claim. I have considered whether or not the construction in the Delaware River or environs should be enjoined until such time as the NRC acts or the Corps acts upon the rechannelization project in terms of permitting or not. The PUC has determined Limerick I's construction is in the best interest of the public and it has directed that PECO complete that construction at the earliest possible time consistent with public safety. The requirements placed upon the applicant NWRA by the Pennsylvania DER is to complete all construction by the end of 1984. The work in the river has to take place within a specified time during any winter, reducing the period of time that can be devoted to construction and with construction with deliberateness, with a view towards public safety and compliance with the minimization of loss of water in transport. The DRBC has determined a need for water in Bucks and Montgomery Counties, based upon the experience in 1980 and 1981 of water problems in those areas with wells running dry.

Balancing the harm that would occur to the public if the project is not available mechanically for the supply of water to [Bucks] and Montgomery Counties through NWRA to supplement the well water and considering the harm to the public if Limerick I is not available for operation on time because of the lack of completion of the mechanical project, versus the harm to the river, to the canal, to the environs, including the bluff, *I find that on balance, the public would suffer more harm if the project presently is enjoined than if it continues.*

(A-60 to A-63) (emphasis supplied).

Petitioners did not challenge these findings of the District Court in the Court of Appeals nor have they requested certiorari on these issues. Their petition raises two abstract legal issues which, even if decided in their favor, would not be grounds for reversing the lower courts' denial of a preliminary injunction.

The extraordinary request made by petitioners in this case is analogous to the issues posed by the state of California in *Brown v. Chote*, *supra*. Seeking to run in the California primary election but deprived of the opportunity to do so because of his inability to pay the filing fee required under the California Elections Code, appellee filed a class action suit challenging the constitutionality of the filing fee and moved the District Court to issue a preliminary injunction. Noting that absent a preliminary injunction, appellee's constitutional right might be irreparably lost for failure to file nomination papers before the deadline, that the appellee *might* prevail on the merits, and that the state of California had failed to show the necessity, purpose or reasonableness of the statute in question, the District Court granted the preliminary injunction.

The state of California appealed¹ positing two ques-

1. Unlike the present case, *Brown v. Chote* arose under 28 U.S.C. §1253 on direct appeal from a three-judge district court in the Northern District of California. *Id.* at 452.

tions for review. First, whether under the Equal Protection Clause, the rational relationship test or the strict scrutiny test applied to the state statute challenged; and second, whether the California Election Code denied indigent voters equal protection of the laws. Refusing to reach the issues raised by the state of California because they went to the ultimate merits of the case, this Court held, in pertinent part:

In the present posture of the case, there is no occasion to consider any issues beyond those addressed by the District Court.

The issuance of the requested preliminary injunction was the only action taken by the District Court. In determining whether such relief was required, that court properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted, absent interlocutory relief. As the District Court opinion clearly evidences, issuance of the injunction reflected the balance which that court reached in weighing these factors and was not in any sense intended as a final decision as to the constitutionality of the challenged statute. In the exigent circumstances, the grant of extraordinary interim relief was a permissible choice; but on the very limited record before the District Court a decision on the merits would not have been appropriate. In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion.

Id. at 456-457.

The District Court in the present case, like the District Court in *Brown v. Chote*, addressed itself to one issue and one issue only — whether to grant a preliminary

injunction. In determining petitioners' likelihood of success on the merits, one prong of the four-prong preliminary injunction standard, the District Court, consistent with this Court's teachings in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), looked primarily to the administrative records already in existence and determined that petitioners were not likely to succeed on their claims under, *inter alia*, the National Historic Preservation Act. As this Court noted in *University of Texas v. Camenisch*, 451 U.S. at 394, it is improper to equate " 'likelihood of success' with 'success,' . . . because it ignores the significant procedural differences between preliminary and permanent injunctions."

Because petitioners are requesting this Court to equate "likelihood of success with success," because independent grounds existed for the Third Circuit to affirm the District Court's denial of a preliminary injunction and because of this Court's narrow scope of review, the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

B. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY DEFINED THE SCOPE OF THE DISTRICT COURT CONSIDERATION OF EVIDENCE DEHORS THE ADMINISTRATIVE RECORD.

District Court review of agency action under the National Environmental Policy Act, 42 U.S.C. §§ 433 *et. seq.*, and the other acts upon which petitioners base their claims is quite narrow. The court is limited to determining whether the decision was based upon a consideration of relevant factors, and whether there has been a clear error of judgment or abuse of discretion. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Moreover, in conducting this review, the final decision of the agency is entitled to a presumption of regularity. *Id.* at 415. Agency action may be set aside

only where it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Administrative Procedures Act ("APA"), 5 U.S.C. §706(2). This standard of review is "highly deferential," and certainly does not permit a *de novo* determination by the reviewing court. *Avoyelles Sportsmen's League, Inc. v. Marsh*, ___ F.2d ___, 19 E.R.C. 1841, 1846 (5th Cir., Opinion filed September 26, 1983). Indeed, this Court has repeated time and again that the reviewing court may not substitute its judgment for that of the agency. See, e.g., *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976); *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park, supra*; *United States v. Bianchi*, 373 U.S. 709, 715 (1963).

While claiming that they are not taking issue with this standard, nor suggesting that the District Court failed to apply it properly, petitioners nevertheless ask this Court to review the District Court's ruling that allegedly excluded certain evidence proffered by them. This Court should not grant review of this question because the petitioners' suggested conflict among the circuits does not exist, and the District Court did not abuse its discretion when it excluded certain evidence which, by petitioners' own admission, would have been duplicative of evidence already in the administrative record and which was never properly proffered by counsel to the court below.

1. *The Asserted Conflict Among The Circuits Does Not Warrant Review.*

In *Vermont Yankee*, this Court made clear that Congress committed to various agencies a host of substantive decisions including the likelihood and magnitude of harm to the environment from various actions, the avail-

ability of alternatives and the choice of action or non-action from among those alternatives. Since these decisions are to be made by the agencies — and not by the courts — certain things follow.

Interested parties must present their views and the bases for their views to the deciding agency for its consideration and may not hold back information hoping to present it to the district court at a later date. Since interested parties are required to present their views to the agency, the reviewing court must limit its review to the record developed before the agency, which, presumptively, contains all of the relevant evidence and an explanation by its proponents of why it is relevant and of what significance it is. While adequate judicial review of a complicated record filled with technical scientific data may require a court to “immerse” itself in the administrative record, *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) *cert. denied*, 426 U.S. 941 (1976), cited in *Avoyelles Sportsmen's League, Inc. v. Marsh, supra.*, 19 E.R.C. at 1846, the issue before the reviewing court is not whether the agency made the correct decision, but whether it followed the correct procedures and whether its decision was arbitrary and capricious or an abuse of discretion based upon the record before it. *Strycker's Bay Neighborhood Council, Inc. v. Karlen, supra*; *Vermont Yankee, supra*; *Kleppe v. Sierra Club, supra*; *Citizens to Preserve Overton Park, supra*; *Avoyelles Sportsmen's League, Inc. v. Marsh, supra*; *Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981). With these principles, not even petitioners disagree.

The necessary implication of this Court's decision in *Vermont Yankee* is, therefore, that evidence outside the administrative record would be relevant and admissible only to the extent necessary to show that some relevant environmental injury or some meaningful alternative was excluded by the agency from consideration, or to explain to the reviewing court, if the reviewing court

deemed it necessary, the meaning or significance of material already in the administrative record. This is precisely the test applied by the District Court and upheld by the Court of Appeals for the Third Circuit below, and no circuit court has ruled otherwise since this Court's decision in *Vermont Yankee*.

Petitioners rely upon three principal cases in the Second, Fifth and District of Columbia Circuits respectively to support their claim that there is a significant disagreement among the circuit courts on the scope of the record which the District Court may consider. Those cases are *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977); *Image of Greater San Antonio, Texas v. Brown*, 570 F.2d 517 (5th Cir. 1978) and *Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981). Of these, only *County of Suffolk* squarely addresses the issue and reaches a conclusion in harmony with the position urged by petitioners.

Image of Greater San Antonio is simply not relevant. The Fifth Circuit there held that an allegation of socio-economic harm, without harm to the physical environment, resulting from a massive layoff at a nearby government facility would not state a claim for relief under NEPA, and sustained the decision not to prepare an Environmental Impact Statement ("EIS") under NEPA.

In *Izaak Walton League*, the District of Columbia Circuit, in a footnote, stated that "Allegations that an impact statement failed to consider serious environmental consequences or realistic alternatives raise issues sufficiently important to warrant introduction of new evidence in the District Court." 655 F.2d at 369, n.56. The text to which this comment is footnoted, however, quotes from this Court's decision in *Overton Park* holding that final agency action must be reviewed "based on the full administrative record that was before the decision maker at the time he made his decision." *Overton*

Park, 401 U.S. at 369. The circuit court then went on to reject the claim that the district court should have resolved certain disputed factual issues *de novo* after hearing the experts on both sides.

[reviewing] courts should not substitute their judgment for that of the agency. *Kleppe v. Sierra Club*, *supra*. . . . In particular, it should not attempt to resolve conflicting scientific opinions. . . . So long as the agency's conclusions have a substantial basis in fact, the mandate of NEPA has been satisfied.

655 F.2d at 371-372.

Thus, a fair reading of the decision in *Izaak Walton League* demonstrates that where evidence outside the administrative record is necessary to prove that there are "serious environmental consequences or realistic alternatives" that the agency excluded from consideration, evidence may be introduced before the District Court to show such exclusion or the materiality of the alternatives not considered. The decision does not support petitioners' claim to a blanket right to present evidence to the district court on issues which were actually before the administrative agency in an attempt to get the court to second guess the agency's evaluation of those issues. Counsel for petitioners stated to the district court and the Court of Appeals that the testimony of all of the witnesses he desired to call had been presented to the reviewing agency, (Appendix "B" to Brief, p. B-1 and B-2).² Thus, there is no basis in *Izaak Walton League* which supports review of this case by this Court.

2. Relevant portions of the Joint Appendix submitted to the United States Court of Appeals for the Third Circuit have been included herein in Appendix "B" to Brief.

In the case at bar, the District Court took the most reasonable, pragmatic approach, and gave petitioners the greatest leeway in their attempt to turn the review of an administrative decision into a new trial on the merits. See, e.g., A-11 to A-12. The court permitted counsel to argue what was in the administrative record, why it demonstrated that the agency had acted improperly, or unreasonably, and why the evidence which petitioners then sought to introduce was necessary. The court then permitted counsel for respondents to argue why the record was sufficient. Where the district court judge concluded from his own review of the record (which was thorough) and from counsels' arguments that further testimony would be only cumulative of what was in the administrative record, and was not necessary to aid him in his understanding of the issues, the evidence was excluded.³

Although *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977) does authorize a much broader evidentiary hearing than was permitted by the court below, it does not give rise to a need for review by this Court. *County of Suffolk* was decided *before Vermont Yankee*, and the broad evidentiary hearing which it supported is clearly at odds with, and cannot survive, the decision in *Vermont Yankee*. Moreover, no circuit which has considered the question since the decision in *Vermont Yankee* has adopted the broad language of *County*

3. Even using this form of review, the hearing before the District Court lasted eight days. One can imagine the length of a review proceeding where petitioners are permitted to present live testimony on every issue which they had presented to the administrative agency and which the agency resolved against them.

of Suffolk and the principle of unfettered presentation of evidence sought by petitioners here.⁴

2. *The Evidence Which Petitioners Claim Was Improperly Excluded Was Repetitive And Cumulative And Was Never Properly Proffered.*

Rule 61, Fed. R. Civ. P. and Rule 103(a) Fed. R. Evid. make it abundantly clear that erroneous evidentiary rulings are not grounds for reversal unless the ruling deprives one of substantial rights and, in the case of the exclusion of evidence, it was clearly and properly proffered to the trial court. Petitioners stated repeatedly to the District Court that all of the witnesses they desired to call would merely "elaborate on material presented to each relevant agency by such witness, his agency, or others," (Appendix "B" to Brief, p. B-1).

In the Court of Appeals, petitioners referred to only five witnesses whose testimony they claimed was erroneously excluded by the District Court; i.e., "biology experts," Paul Harmon, Kathryn Auerback, Samuel Landis, and Colleen Wells.

(a) *Biology Experts*: The District Court admitted the testimony of Richard McCoy of the U.S. Fish and Wildlife Service. The balance of the proffered testimony was already in the Corps' administrative file, (Appendix "B" to Brief, p. B-2 to B-5).

(b) No proffer of *Paul Harmon* was actually made.

4. *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980); *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1028 (4th Cir. 1975) *cert. denied*, 423 U.S. 912 (1975). See also, *Asarco, Inc. v. Environmental Protection Agency*, 616 F.2d 1153 (9th Cir. 1980); *Izaak Walton League of America, supra*. (D.C. Cir. 1981); *Avoyelles Sportsmen's League, Inc. v. Marsh, supra*. (5th Cir. 1983).

(c) *Kathryn Auerbach and Samuel Landis* were never properly proffered to the court as witnesses, nor did the court make any ruling excluding their testimony.

(d) *Samuel Landis'* testimony was excluded as hearsay, (Appendix "B" to Brief, p. B-5).

(e) Colleen Wells' testimony was never proffered, (Appendix "B" to Brief, p. to B-6 to B-7).

The administrative record containing the submissions of these and other witnesses was before the District Court; even petitioners' counsel admitted that the proffered testimony was cumulative. This Court certainly should not grant review of an evidentiary ruling which was so clearly within the proper range of the District Court's discretion.

C. THE DISTRICT COURT CORRECTLY RULED IN DENYING PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION THAT PETITIONERS DID NOT DEMONSTRATE A REASONABLE LIKELIHOOD OF PREVAILING ON THEIR CLAIM UNDER THE NATIONAL HISTORIC PRESERVATION ACT; THE DISTRICT COURT DID NOT REACH THE ULTIMATE MERITS

The District Court ruled, in pertinent part, that petitioners were not likely to prevail on their claim under the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§470 *et seq.*⁵ But petitioners continue to address only the merits of the Corps of Engineers compliance with the Act; issues which are properly to be decided in the first instance by the District Court at trial on petitioners' request for a permanent injunction. The issues raised by

5. Petitioners have not appealed, indeed could not appeal under 28 U.S.C. §1291(a)(1), the District Court's dismissal of their NHPA claims under F.R.C.P. 12(b)(1). See A-6; A-15 to A-16; A-65 to A-66.

petitioners are primarily factual and it is inappropriate to raise them on appeal challenging a denial of a preliminary injunction. *University of Texas v. Camenisch*, 451 U.S. 390, 394-395, 398 (1980); *Brown v. Chote*, 411 U.S. 452, 457 (1973). Assuming, arguendo, that Section 110(f) of the Act was applicable to this project,⁶ and the NHPA issues are ripe for decision by this Court, the Corps of Engineers fully complied with the obligations imposed thereby and no issue of national importance is presented to justify this Court's certiorari jurisdiction.

Section 110(f) provides:

Prior to the approval of any Federal Undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal Agency shall, to the maximum extent possible, *undertake such planning and actions as may be necessary to minimize harm to such Landmark*, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. (Emphasis supplied).

Petitioners argue that Section 110(f) imposes a mandatory obligation on the Corps of Engineers to consider alternatives to this privately owned and privately financed project which may have a technically adverse impact on a national landmark. The sole controlling precedent upon which they rely is *Citizens to Preserve*

6. Section 110(f) applies to historic properties owned or controlled by Federal agencies. It does not apply where a federal agency is permitting a privately owned and privately financed project. Indeed, the introductory language of Section 110(f) states "(t)he heads of all Federal Agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency." 16 U.S.C. §470 H-2(a)(1). The Delaware Canal is neither owned nor controlled by a federal agency; it is owned and controlled by the Commonwealth of Pennsylvania. Furthermore, this project is not supported by any federal funds or any other kind of federal assistance.

Overton Park v. Volpe, 401 U.S. 402 (1971). In *Overton Park*, however, this Court was not concerned with the NHPA, but rather with Section 4(f) of the Department of Transportation Act of 1966 ("DOTA"), as amended, 49 U.S.C. §1653(F), and Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. §138.⁷ Both highway statutes contain express language requiring consideration of "*prudent and feasible alternatives to potentially destructive action.*" (Emphasis supplied).

Under these highway statutes, the Secretary of Transportation must engage in a two-step review process before funding construction. First, s/he must look at all alternatives to building in a public park. If after reviewing the alternatives none is determined feasible and prudent, the Secretary of Transportation must be assured that there has been all possible planning to minimize harm to the park.

Although the legislative history of Section 110(f) of NHPA does contain reference to consideration of "prudent and feasible alternatives," the Act does not. And the differences between Section 110(f) of NHPA and Section 4(f) of DOTA are significant.

Section 4(f) of DOTA is mandatory; it prohibits the Secretary of Transportation from approving transportation plans or programs which require the use of public parks if there is a feasible and prudent alternative to such use. An earlier version of Section 110(f) did contain an express requirement that the reviewing agency consider feasible and prudent alternatives to an action which would potentially adversely affect a National Historic Landmark. This language, however, was deliberately deleted from the bill and was not reinstated in the final form.

The legislative history of Section 110(f), on the other hand, does contain discretionary language; it says

7. The full text of these two statutory provisions are included in the Appendix "A" to Brief.

only that the Committee (the Committee on Interior and Insular Affairs, to whom the bill to amend the NHPA of 1966 was referred) intends that feasible and prudent alternatives be considered. (See, e.g. H.R. Rep. No. 96-1457, at 38, 96th Cong., 2nd Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 6378, 6401. However, the deletion of the mandatory requirement to consider alternatives from the statutory language must mean that while it may be appropriate or desirable in some cases to consider alternatives, failure to do so is not *per se* non-compliance with the law.

Moreover, there is a significant difference in the underlying public policy of the two statutes and on that basis as well, Section 4(f) of DOTA imposes a more stringent review standard on the Administrator than does Section 110(f) of NHPA. As noted by the Court in *Overton Park, supra*, from the point of view of efficiency of development, parkland will always be the preferable site for a highway. If parkland is used, there is no need to condemn private property and there is no displacement of residents or workers. Thus, for Section 4(f) of DOTA to have meaning, the Secretary must be prohibited from approving the destruction of parkland unless he finds that alternative routes present unique problems. *Overton Park, supra* at 412. Obviously, there is no such preference for public destruction of natural historic landmarks and, therefore, the express language of Section 110(f) is capable of adequately protecting those landmarks without so severely restricting the reviewing agency and, more importantly, private parties.

Despite the explicit language of Section 110(f) and its legislative history, petitioners argue that the Corps of Engineers did not meet its 110(f) responsibilities because it failed to identify, consider or adopt a canal crossing which would minimize harm to the canal (Petitioners' brief at 42). This is not the Section 110(f) standard. Taking the most conservative view, the Corps of Engineers was only required to consider alternatives in as-

sessing ways to minimize harm to the landmark. This obligation was met.⁸

In evaluating the Corps of Engineers consideration of alternatives, the District Court ruled that the Corps of Engineers was entitled to rely upon the DRBC's conclusions with regard to alternative canal crossings. DRBC's evaluation of project alternatives was exhaustive and DRBC rejected each alternative as infeasible, (*See, e.g.*, Finding of Fact 107, A-123). This conclusion by the DRBC was subjected to intense judicial scrutiny and was upheld, *Delaware Water Emergency Group v. Hansler, supra*; a decision which is binding upon petitioners, (A-24 to A-25).

The Corps of Engineers review of alternatives also included an evaluation of the Environmental Assessment prepared by DER in 1982 and NWRA's own analysis which carefully considered the alternatives which might be pursued and the likely impact of these alternatives, (*See, e.g.*, Findings of Fact 108-113, A-124 to 126). On the basis of all these evaluations, the Corps of Engineers concluded that crossing the canal was required and that the only prudent and feasible crossing place was Point Pleasant, (*See, e.g.*, Findings of Fact 104, A-123 and 112, A-126).

The Corps of Engineers took additional steps consistent with its Section 110(f) responsibilities. The Corps of Engineers had before it a record that demonstrated a long-standing (since 1978) and ongoing effort by NWRA, DER, the Pennsylvania Historical and Museum Commission, DRBC, and the Heritage Conservation and Recreation Service to plan and execute a project which would not only mitigate any potential harm to the canal, but would, in fact, be beneficial, (*See, e.g.* Finding of Fact 113, A-126).

8. Respondent NWRA does dispute petitioners allegation that the Corps of Engineers "wholly failed to consider alternative projects." (Petitioners brief at 45). *See, e.g.*, Findings of Fact 104, A-123 and 108-111, A-124 to A-126; A-28.

Despite this conclusion, the Corps of Engineers consulted with the State Historic Preservation Officer and Advisory Council on Historic Preservation and developed a Memorandum of Agreement ("MOA") with these agencies and the NWRA which required NWRA to follow conservative construction techniques in laying the pipeline under the canal and to use carefully controlled blasting methods under the scrutiny of DER, owner of the landmark. The MOA provides for administrative agency oversight of the entire construction process and for archaeological study and recording of the construction in and around the canal during the construction period, (*See, e.g.,* Findings of Fact 114-116, A-127).

It is therefore clear why the District Court found that the petitioners were not likely to prevail on the merits under Section 110(f). Legally, petitioners were not entitled to review⁹ and factually, the Corps of Engineers fully complied with its Section 110(f) responsibilities.

Since there is abundant basis to support the District Court's conclusion that petitioners were not likely to prevail on their claim under the NHPA, (*See, e.g.* A-27 to A-33) this Court should not accept certiorari. If petitioners desire a complete review of the Corps of Engineers Section 110(f) evaluation, they must first seek review at a final hearing on the merits before the District Court. The clearly factual nature of the issues involved precludes any further consideration until such time as petitioners pursue that remedy.

9. *See* fn. 5, *supra*.

IV. CONCLUSION

For the foregoing reasons, Neshaminy Water Resources Authority, respondent herein, respectfully requests that this "Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit" be DENIED.

Respectfully submitted,



Alan M. Lerner
Hershel J. Richman
David J. Brooman

*Counsel for
Neshaminy Water
Resources Authority*

OF COUNSEL:

COHEN, SHAPIRO, POLISHER,
SHIEKMAN AND COHEN

Twenty Second Floor
Philadelphia Savings
Fund Building
12 South 12th Street
Philadelphia, PA 19107
(215) 922-1300

Date: December 2, 1983

CERTIFICATE OF COUNSEL

I, Alan M. Lerner, do hereby certify that I am a member in good standing of the United States Supreme Court.

A handwritten signature in dark ink, appearing to read 'Alan M. Lerner', is written over a horizontal line.

Alan M. Lerner

CERTIFICATE OF SERVICE

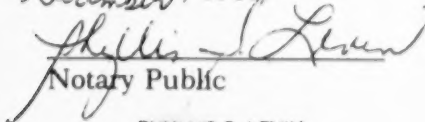
I hereby certify that a copy of the foregoing "Brief of Neshaminy Water Resources Authority In Opposition To Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit" on behalf of Respondent, Neshaminy Water Resources Authority, has this day been mailed to the Clerk of this Court and has been served upon Counsel of Record listed on the attached service list by United States first class mail, postage prepaid.

By: 

Alan M. Lerner

Sworn to and subscribed
before me this 2nd day of

December, 1983.


Notary Public

PHYLLIS S. LEVIN

Notary Public, Phila., Phila. Co.

My Commission Expires March 17, 1986

SERVICE LIST

Joan K. Garner, Esquire
Assistant United States Attorney
601 Market Street
Philadelphia, PA 19106

Marc Dolchin, Esquire
U.S. Army Corps of Engineers
2nd and Chestnut Streets
Customs House
Philadelphia, PA 19106

Janet L. Steckel, Esquire
Attorney, Appellate Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Robert J. Sugarman, Esquire
Sugarman and Denworth
Suite 510

North American Building
121 South Broad Street
Philadelphia, PA 19107

Bernard Chanin, Esquire
Wolf, Block, Schorr & Solis-Cohen
12th Floor
Packard Building
Philadelphia, PA 19102

Troy B. Conner, Jr., Esquire
Conner & Wetterhahn, P.C.
1747 Pennsylvania Avenue, N.W.
Suite 1050
Washington, D.C. 20006

James D. Morris, Esquire
Assistant Counsel
Office of Chief Counsel — Eastern Region
Department of Environmental Resources
Commonwealth of Pennsylvania
Suite 1200
1315 Walnut Street
Philadelphia, PA 19107-4786

APPENDIX

APPENDIX "A" TO BRIEF

Section 4(f) of the Department of Transportation Act of 1966 provides:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

49 U.S.C. § 1653(f) (1964 ed., Supp V).

Section 18(a) of the Federal-Aid Highway Act of 1968 provides:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall co-

operate and consult with the Secretaries of the Interior, Housing and Urban Development and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

23 U.S.C. § 138 (1964 ed., Supp V).

APPENDIX "B" TO THE BRIEF

**IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DEL-AWARE UNLIMITED, INC.,)	
<i>et al.,</i>)	
<i>Plaintiffs</i>)	
)	
<i>v.</i>)	CIVIL ACTION
)	
ROGER M. BALDWIN, <i>et al.,</i>)	NO. 82-5115
<i>Defendants</i>)	

**MEMORANDUM REGARDING DEL-AWARE'S
PRELIMINARY INJUNCTION HEARING PLAN**

I. Order Of Witnesses And Summary Of Testimony

Plaintiffs presently plan to present the following witnesses at the Preliminary Injunction Hearing:^{1 2}

1. All witnesses will elaborate on material presented to each relevant agency by such witness, his agency, or others.

2. Plaintiffs may vary this list due to availability of witnesses, need, and avoidance of duplicate testimony.

(Joint Appendix to the U.S. Court of Appeals for the Third Circuit, p. A-191).

**SELECTED PORTIONS OF TRANSCRIPT OF THE
HEARING BEFORE THE DISTRICT COURT
ON PETITIONERS' MOTION FOR A
PRELIMINARY INJUNCTION**

...
"THE COURT: Do you concede that every subject concerned that the plaintiffs would advance here had been raised to the deciding agencies?

MR. SUGARMAN: Absolutely, with one or two maybe exceptions about things that came up at the last moment. Within the last week even things are still happening, the archaeologists are finding things on site that the agency —

THE COURT: That side (sic).

MR. SUGARMAN: We blanketed the agency, we told them all about the concerns and we provided them with detailed discussions; we provided them with expert evidence in some cases and other federal agencies like the Fish and Wildlife Service kept telling the Corps, this should be done and this should be done and asked the Corps to study and make an independent appraisal. All of these matters were brought to the attention of the agency repeatedly, just as in the West Way case, the agency had the information before it. . . ."

(Joint Appendix to the United States Court of Appeals for the Third Circuit, p. A-2150).

...

"MR. SUGARMAN: . . .

Again, Your Honor, our point is, if they didn't accept what we said, their option was to do an environmental impact statement to find the answer. There was a serious substantial dispute on a scientific matter. It could have a substantial and significant effect on the — the fish people told them that over and over, again and again, we cite the letter from the Pennsylvania Fish

Commission of March 24, 1982. Counsel for the Pennsylvania Fish Commission are here, the witnesses are here from the Pennsylvania Fish Commission. I am sure Your Honor will hear counsel. The witnesses are here if Your Honor wishes to hear them. . . .

THE COURT: Your position is that there is evidence that the intake mouth is presently in the eddy flow?

MR. SUGARMAN: Yes, sir.

THE COURT: At certain flows?

MR. SUGARMAN: Yes, sir.

THE COURT: Do you have another point?

MR. SUGARMAN: On the intake and on the eddy, yes, sir. Only additional statements of essentially the same thing, Your Honor. . . ."

(Joint Appendix to the United States Court of Appeals for the Third Circuit, p. A-2261-62).

. . . .

"MR. SUGARMAN:

But, Your Honor, the fish people are convinced that there are shad spawning going on there in Point Pleasant and they so testified and they so advised the Corps of Engineers, and we sent their system onto the Corps of Engineers, but they are here today, too, Your Honor, and they are prepared to testify. . . ."

(Joint Appendix to the United States Court of Appeals for the Third Circuit, p. A-2269).

. . . .

"MR. SUGARMAN: I take it, you will not need any witnesses on this, and will not be admitting any oral testimony on this subject?

THE COURT: Yes, I have all that I need, I believe on this issue.

MR. SUGARMAN: Very good.

THE COURT: I don't know of anything that any witness would add to the record, do you?

MR. SUGARMAN: Yes, sir. I think the witnesses on the fish could explain to Your Honor why it is that they anticipate from their history of managing fish, I am talking about the fish experts, and the fish agencies, why there is no reason to expect that anything is likely to be done that would enable the fish to be protected in the likely probability this intake has an adverse affect on fish. I also think —

THE COURT: What you do (sic) mean by that?

MR. SUGARMAN: Assuming the question that Mr. Goldberg was raising and Mr. Richman was raising, can the DRBC protect the fish by changing the operation or changing the permit or whatever or taking action in response to monitoring and the fish people likely to have input to that, I am talking about the U.S. Fish and Wildlife and the Pennsylvania Fish Commission, and the witnesses can testify of the history, what they had to do to get the DRBC to protect fish.

THE COURT: I understand the proffer (sic) testimony.

MR. SUGARMAN: I am sorry.

THE COURT: Go ahead.

MR. SUGARMAN: The other principal area of evidentiary testimony that we would offer is to indicate that the intake is not only in an area of lower velocity than that which is necessary to protect them in the main channel or that is to say, on the side closer to the main channel but on the side closer to the eddy, it is subject to the eddy flows which are substantially lower than the flows in the river and where the fish would be repeatedly subjected. In other words, that's a disputed point we contend.

THE COURT: Were these contentions put before the Corps?

MR. SUGARMAN: Yes, sir.

THE COURT: It's on the record?

MR. SUGARMAN: Yes, sir.

THE COURT: Okay, I do not require testimony on what is already in the record."

(Joint Appendix to the United States Court of Appeals for the Third Circuit, p. A-2392-2393).

THE COURT: I am certainly not in a position to say that the site is archaeologically insignificant. Nor am I in a position to say that it is significant.

MR. SUGARMAN: There is one other matter relating to that and again Mr. Landis and Miss Auerbach are here and can testify the consultant they hired to do the project is from Michigan. But in taking the stuff out that they're doing now, they are transporting it to Michigan, their office is in Michigan. They are not Pennsylvania archaeologists. They admit frankly, they're not familiar with the nature of what they're looking at in this —

THE COURT: You're testifying.

MR. SUGARMAN: Well, I am offering discussion and I am offering a witness to testify.

THE COURT: Subpoena the archaeologists, the ones who are responsible for doing — who are out there. It's hearsay to have even testimony about what — people who are not in the courtroom say.

MR. SUGARMAN: Mr. Landis, who is in the courtroom was part of the archaeological team.

THE COURT: It's still hearsay as to what was said to him about the archaeologist who was at the site.

MR. SUGARMAN: I agree, sir. . . ."

(Joint Appendix to United States Court of Appeals for the Third Circuit, p. A-2817).

"MR. SUGARMAN: In summary, we contend that the documents and the testimony of Miss Wells, who visited the Corps frequently, make it clear that the Corps had decided before the completing of its environmental assessment that they were not going to prepare an environmental impact statement, and had kept documents from the public, such as its salinity study and such.

A letter it wrote to Fish and Wildlife Service and numerous other documents and actions that it took, and memorandum in the record, in the Corps' record, would suggest that the Corps was essentially engaged in an effort to get the permit issued rather than an investigation.

THE COURT: What is your next category?

MR. SUGARMAN: The next category is the failure to permit the public to respond to the submissions of the applicant in a timely fashion.

And the essential facts are this, they wouldn't give out documents that the applicant had submitted, and thereby made it impossible to receive public comment. In some cases, formal Freedom of Information requests had to be filed.

The next point is the — and final point, is the failure to prepare an environmental impact statement with respect to the permit issuance.

I categorize that as a procedural defect because the cases have described the duty to prepare an environmental impact statement as a procedural legal obligation.

One other, that is the public interest, arbitrary and capricious action in regard to the public interest determination, and I really must say, I think that's more of a matter of legal argument because the facts are already, I think are before the Court on the individual issues.

THE COURT: If there was a cover-up and predetermination in your view there would be arbitrary and capricious action?

MR. SUGARMAN: Exactly. . . ."

"THE COURT: We will proceed with your presentation, Mr. Sugarman, before defendants respond on failure to consider cumulative effects, duty to make an independent evaluation, failure to await the NRC action and the Plumstead Township action, misinterpretation of the rule of the Fish Commission, Pennsylvania Fish Commission.

So, you will not be addressing the Clean Water Act issues or the cover-up and predetermination at this time. You have finished the segmentation issue.

MR. SUGARMAN: I finished it with this exception, Your Honor: I would like to mention two documents which — well, in light of what Your Honor said.

THE COURT: You said you had finished the segmentation issue.

MR. SUGARMAN: I am finished, Your Honor. That would be more, just more cumulative information. . . ."

(Joint Appendix to United States Court of Appeals for the Third Circuit, p. A-2843,44,45).

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No. 83-740

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED, INC., *et al.*,
Petitioners,

v.

ROGER M. BALDWIN, *et al.*,
Respondents.

On Petition For a Writ Of Certiorari To The United
States Court Of Appeals For The Third Circuit

**BRIEF FOR RESPONDENT PHILADELPHIA
ELECTRIC COMPANY IN OPPOSITION**

TROY B. CONNER, JR.
ROBERT M. RADER
CONNER & WETTERHAHN, P.C.
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 833-3500

BERNARD CHANIN
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
12th Floor
Packard Building
Philadelphia, PA 19102
(215) 977-2046

QUESTIONS PRESENTED

1. Did the district court err as a matter of law in receiving some, but not all, evidence proffered by petitioners *de novo* which was extrinsic to the administrative records of the respondent agencies in reviewing their decisions under the National Environmental Policy Act of 1969?

2. In considering prudent and feasible alternatives to mitigate any potential adverse effects to national historic landmarks under Section 110(f) of the National Historic Preservation Act, may an agency rely upon information developed by another federal agency in its separate review of the proposal?

INDEX

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
STATEMENT	2
ARGUMENT	5
CONCLUSION	9

CITATIONS

CASES:	Page
<i>American Construction Co. v. Jacksonville, T & K.W.R. Co.</i> , 148 U.S. 372	5
<i>Camp v. Pitts</i> , 411 U.S. 138	6
<i>Cobbledick v. United States</i> , 309 U.S. 323	5
<i>Delaware Water Emergency Group v. Hansler</i> , 536 F. Supp. 26, <i>aff'd mem.</i> 681 F.2d 805	2, 3
<i>Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.</i> , 240 U.S. 251	5
<i>Henry v. FPC</i> , 513 F.2d 395	8
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390	7
<i>Silentman v. FPC</i> , 566 F.2d 237	8
<i>Strycker's Bay Neighborhood Council, Inc. v. Karlen</i> , 444 U.S. 223	6
<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.</i> , 435 U.S. 519	6
<i>Youngstown Sheet and Tube Co. v. Sawyer</i> , 343 U.S. 579	5
STATUTES AND REGULATIONS:	
Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344	2
Judiciary and Judicial Procedure Act	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2101(c)	1
National Environmental Policy Act of 1969, 42 U.S.C. § 4332	2
National Historic Preservation Act	
16 U.S.C. § 470h-2(f)	2, 7
Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403	2
40 C.F.R. § 1506.3	8

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OPINION BELOW

The judgment order of the court of appeals is not reported.

JURISDICTION

The one-page judgment order of the court of appeals (Pet. App. 1a-2a) was entered on July 5, 1983. A petition for rehearing was denied in an order entered on August 2, 1983 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on October 31, 1983. Although petitioners invoked jurisdiction under 28 U.S.C. § 2101(c), which is not a jurisdictional provision, it appears that jurisdiction exists under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners seek review of a court of appeals judgment order affirming the district court's denial of a preliminary injunction. Petitioners had sought to halt construction of a privately sponsored water supply project in Point Pleasant, Pennsylvania. The project, which has required approval by a number of federal and State agencies, will provide supplemental cooling water for the Limerick Generating Station, a nuclear facility owned by respondent Philadelphia Electric Company ("PECO"), and will provide public drinking water for the service area of respondent Neshaminy Water Resources Authority ("NWRA").

In *Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26 (E.D. Pa. 1981), *aff'd mem.*, 681 F.2d 805 (3d Cir. 1982), the Eastern District of Pennsylvania and Third Circuit Court of Appeals had previously rejected similar claims challenging compliance by the Delaware River Basin Commission ("DRBC") with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332, and other statutes related to the protection of the environment and historic resources.¹ In this most recent challenge, petitioners attacked decisions by the United States Army Corps of Engineers² and DRBC, *inter alia*, alleging noncompliance with NEPA and Section 110(f) of the National Historic Preservation Act, 16 U.S.C. § 470h-2(f).

¹ In 1981, DRBC gave formal approval to the project pursuant to Section 3.8 of its Compact.

² The Corps issued a "dredge and fill" permit pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, and Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344.

Each agency compiled a voluminous record in conducting its independent review of the project, including numerous scientific studies and comments from other agencies and interested members of the public. These well developed and authoritative records were certified to the district court.³ Both DRBC and the Corps of Engineers concluded that environmental impacts of the project would be minimal. Relying in part upon findings made by DRBC in its prior review as previously affirmed by the district court and court of appeals, the Corps of Engineers specifically determined that construction and operational impacts to the Delaware Canal, an historic landmark, would be temporary and insignificant. The Corps also determined that, given the overall evaluation of the project, the crossing of the Canal as proposed was the only "prudent and feasible alternative." Finally, the Corps found that adequate planning and precautions had been undertaken to ensure minimizing harm to the Canal.

The Corps of Engineers conducted a full review of the environmental impacts of the project, as well as its impacts upon area historic and archeological resources, but naturally focused most sharply upon impacts associated with the subject of its permit issuance. In other words, the Corps focused its concern on the construction and operation of the Point Pleasant pumping station and intake structure, including the structural changes in the Delaware Canal where the station's intake pipes would cross. In this regard, the Corps cooperated with the cognizable State authorities and the Advisory Council on Historic Preservation in evaluating potential impacts and implementing a Memorandum of Agreement among those

³ The certified record of the DRBC had previously been submitted in the *Delaware Water Emergency Group* case.

parties defining the terms and conditions necessary to eliminate and/or minimize any temporary damage to the Canal during construction.

Throughout its review, the Corps of Engineers met with petitioners and their legal counsel on several occasions to discuss their concerns. The Corps also considered the input of all concerned State and federal agencies as well as public commentators. The Corps studiously observed all applicable procedural requirements in affording public notice and participation in its decision-making process.

Petitioners below contended that the Corps should have considered distant sites for the project, but conceded that the Corps had considered alternative sites within the Point Pleasant area based upon a Corps consultant study submitted to the Advisory Council on Historic Preservation, the adequacy of which petitioners did not challenge below. Petitioners' argument that distant site alternatives should have been considered was specious and utterly impracticable. If required to build the station at a distant location, all of the exhaustive review conducted by federal, State, and local agencies since 1966 would have been negated. Such action would have necessitated respondents PECO and NWRA to seek further agency approvals and, inevitably, yet another round of environmental analysis. In any event, petitioners' argument is entirely academic given the Corps' finding that construction impacts would only be temporary and insignificant.

Under such circumstances, the Corps of Engineers properly found that distant sites were not "prudent and feasible," and the district court correctly determined that the Corps "did consider and gave great weight to the determination by DRBC, that Point Pleasant was the

proper site for the intake to accomplish the water supply permits which it had issued, pursuant to the entire history of the Point Pleasant project, including those matters which were before [the district court in the *Delaware Water Emergency Group* case]" (Pet. App. 20a-21a).

ARGUMENT

The judgment order of the court of appeals affirming the denial of a preliminary injunction is consistent with the governing statutes and, contrary to petitioners' assertion, presents no conflict with prior decisions of this Court or other courts of appeals.

1. Preliminarily, the questions raised by petitioners do not arise from a final judgment of the district court or court of appeals. This Court will not review an interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893). See also *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 584-85 (1952); *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

There is no reason for the Court to review petitioners' issues on an interlocutory basis. Even if review were granted, the Court's consideration of the questions presented would be gratuitous. Petitioners would not in any event be entitled to a preliminary injunction because the district court found that they failed to satisfy the other requirements for preliminary relief apart from their failure to demonstrate a likelihood of success on the merits (Pet. App. 58a-59a).

2. Petitioners incorrectly assert that the district court erred as a matter of law in excluding testimony extrinsic to the administrative records of DRBC and the Corps of Engineers.⁴ In each agency proceeding petitioners were given a full opportunity to comment on the proposed project. Petitioners' objections were therefore included in the record and were fairly considered. In essence, petitioners desired a *de novo* hearing on their objections in order to challenge the wisdom of the agencies' substantive decision-making. Such review was clearly beyond the jurisdiction of the district court, as it properly recognized (Pet. App. 15a-16a).

As a general rule, a district court must limit its review to the agency's administrative record. *Camp v. Pitts*, 411 U.S. 138, 143 (1973). This rule is particularly apt in NEPA cases because NEPA sets forth only procedural requirements; substantive decision-making of the agency is not judicially reviewable. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228-29 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). In deciding whether judicial review under NEPA permits acceptance of extrinsic evidence, the courts have considered the comprehensiveness of the administrative record, the degree to which objectors were permitted to participate in its development, and the clarity with which the agency's rationale for its actions is explained. The exercise of the district court's discretion in evaluating these considerations provides no occasion for review by

⁴ The district court admitted some 84 exhibits proffered by petitioners. It made no finding that these documents should have been included in the administrative record, but considered them anyway.

this Court.⁵ In the case below, the records certified by the agencies were clearly sufficient to enable the district court to determine that the agencies had given a "hard look" at potential environmental impacts. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). Petitioners, however, simply challenge the validity of the agency's technical and scientific findings, a role which the district court properly eschewed.

3. The question presented by petitioners under the National Historic Preservation Act involves a simple factual determination as to whether, in the language of Section 110(f) of the Act, the Corps of Engineers did, "to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm" to the Delaware Canal.⁶ The district court's factual review of the Corps' consideration of other Canal crossing sites, based upon the study prepared by its consultant, information developed by DRBC in its separate review of the project, and consultation with the Advisory Council on Historic Preservation, provides no occasion for review by this Court.

The legal issue posed by petitioners is wholly contrived. Respondents below did not claim that the Corps was "bound" by any determination DRBC made under Section 110(f), but merely asserted, as the district court properly found, that the Corps "deferred to the DRBC" as to the determination of the appropriate point along the

⁵ As petitioners concede, the district court did consider the testimony of one witness as well as numerous documents extraneous to the record (Pet. 20).

⁶ Petitioners frame the issue similarly, i.e., whether the Corps failed "to identify, consider or adopt a canal crossing location which would minimize harm to the Canal" (Pet. 42).

Delaware River to divert its flows for the project "given [DRBC's] other determinations of river resources, basin resources and the needs for water in Bucks and Montgomery Counties, as well as for PECO at Limerick" (Pet. App. 19a). Inasmuch as the record fully supports the Corps' finding that adequate measures could be taken at the proposed Canal crossing to minimize any harm to the Canal, it was unnecessary for the Corps to consider geographically dispersed site alternatives that would, as a practical matter, eliminate the proposed project as already approved by DRBC. The fact that only insignificant and temporary impacts to the Canal would occur under the carefully analyzed procedures agreed upon by the federal agencies could not be ignored by the Corps of Engineers in concluding that other alternatives were not "prudent and feasible."

Thus, while the Corps properly relied in part upon DRBC's determination as to the appropriateness of the proposed project site, its reliance upon another agency's findings⁷ raises no significant question of continuing interest that warrants review by this Court.

⁷ It is well recognized that agencies may coordinate and cooperate with each other under NEPA and may rely upon previous agency findings. *Silentman, v. FPC*, 566 F.2d 237, 240 (D.C. Cir. 1977); *Henry v. FPC*, 513 F.2d 395, 407 (D.C. Cir. 1975). See 40 C.F.R. § 1506.3

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TROY B. CONNER, JR.

ROBERT M. RADER

CONNER & WETTERHAHN, P.C.

1747 Pennsylvania Avenue, N.W.

Washington, D.C. 20006

202/833-3500

BERNARD CHANIN

WOLF, BLOCK, SCHORR

AND SOLIS-COHEN

12th Floor

Packard Building

Philadelphia, PA 19102

215/977-2046

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